S. HRG. 98-160

DISBURSEMENT OF BIA FUNDS FOR STUDY OF BLACKFEET RESERVATION IRRIGABLE LAND

HEARING

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

THE OVERSIGHT OF DISBURSEMENT OF FUNDS BY THE BUREAU OF INDIAN AFFAIRS TO DO A STUDY OF THE IRRIGABLE ACRES ON THE BLACKFEET INDIAN RESERVATION IN MONTANA

APRIL 12, 1983

WASHINGTON, D.C.

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CONTENTS

WITNESSES

Page
Bear Medicine, Joe, member, honorary council, Blackfeet Tribe 46
Boggs, Dan, land department, Blackfeet Tribe 46
Cole, Matt, Assistant Area Director for Trust Responsibilities, DOI 79
Corke, Philip, Acting Chief, Water and Land Resources Division, Office of Trust Responsibilities, DOI 79
Dinkins, Carol E., Assistant Attorney General, Land and Natural Resources, Department of Justice 94
  Prepared statement 100
Fritz, John, Deputy Assistant Secretary for Indian Affairs, DOI 79
  Prepared statement 93
Kaczmarek, Michael B., chief geologist and soil scientist, Morrison-Maierle, Inc., Helena, Mont 4
  Prepared statement 16
Maierle, Joe A., chairman of the board, Morrison-Maierle, Inc., Helena, Mont 4
  Prepared statement 9
Mills, Sidney, Director, Office of Trust Responsibilities, DOI 79
Old Person, Earl, tribal chairman, Blackfeet Tribe 46
  Prepared statement 54
Potts, Francis, chairman, honorary council, Blackfeet Tribe 46
Running Crane, Willie, member, honorary council, Blackfeet Tribe 46
Twitchell, Jack, employee, CH2M Hill, Inc., Corvallis, Oreg 35
  Prepared statement 41
Vetter, Bill, attorney, Blackfeet Tribe 46

MATERIAL SUBMITTED FOR THE RECORD

Department of the Interior evaluation of the Morrison-Maierle, Inc. report, submitted by CH2M Hill, Inc 45
An exchange of correspondence among Senator Melcher, the Department of the Interior, and Earl Old Person of the Blackfeet Tribe in re land classification studies 49
Additional information supplied by Daniel C. Boggs of the Blackfeet tribal council 58
Memorandum from Alexander H. Good, Associate Solicitor, Energy and Resources, DOI, to the Under Secretary, DOI 103
Memorandum from Daniel Rosenfelt, Assistant Solicitor, Water and Power, DOI, to the Acting Director, Office of Trust Responsibilities, DOI 112
Prepared statement of Mel Tonasket, vice chairman of the Colville Confederated Tribes, with attached resolutions 114
Letter from Ronnie Lupe, tribal chairman, White Mountain Apache Tribe; to Senator Melcher, with enclosed statement 136

DISBURSEMENT OF BIA FUNDS FOR STUDY OF BLACKFEET RESERVATION IRRIGABLE LAND

APRIL 12, 1983

U.S. Senate,
Select Committee on Indian Affairs,
Washington, D.C.

The select committee met, pursuant to notice, at 9:30 a.m., in room 628, Dirksen Senate Office Building, Senator John Melcher (acting chairman) presiding.

Staff present: Paul Alexander, staff director; Max Richtman, minority staff director; Virginia Boylan, staff attorney; Maria Mendoza, staff attorney.

Senator **Melcher**. The hearing will come to order.

The Select Committee on Indian Affairs has called this hearing to investigate a contract for $1.2 million awarded by the Department of the Interior to CH2M Hill, Inc., an Oregon-based engineering firm.

The ostensible purpose of the contract is to conduct soil studies for land classification purposes on the Blackfeet Indian Reservation in Montana. The Blackfeet Tribe is litigating its water rights.

The committee questions, first and foremost, whether the contract in question duplicates work already completed and paid for by the BIA.

Second, we seriously question the manner in which the funds were released for the contract. The BIA had knowledge of this committee's deep reservations about the propriety of the contract prior to releasing funds.

Third, the initial use of water resource program funds for the contract and the subsequent transfer of rights protection funds, raises the question of improper and illegal allocation of Government money.

Fourth, we question the Bureau's actions as primary trustee for Indians, in light of the tribe's repeatedly expressed opposition to the contract.

Fifth, the committee has questions of possible conflict of interest involving both present and former BIA employees that need to be resolved.

Taken overall, I fear that the answer to these questions may point to mismanagement and questionable decisionmaking that could result in the misuse of over $1 million of public funds.

The first question on duplication arises because the Department has knowingly authorized the expenditure of funds for work that has been finished and compensated. The firm of Morrison and Maierle of Helena, Mont., conducted soil studies on the Blackfeet Reservation in the mid-1970's. The final phase of their contract was completed in 1979.

The committee needs to be convinced of the need for a new study and exactly how the work intended to be accomplished by CH2M Hill, Inc., would differ from that already done by Morrison and Maierle. And, if it will differ or augment the previous study, whether the expected results can justify the expenditure of $1.2 million.

I am not impressed with the judgment of the Department of the Interior in determining a new, million-dollar study should be purchased. However, on January 14, 1981, the Assistant Solicitor for Water and Power of the U.S. Department of the Interior sent a memo to the Acting Director of the Office of Trust Responsibilities at the BIA on the subject of expert witnesses in litigation. I quote from the memo:

> It appears that the Department of Justice is concerned that certain experts, employed by the BIA area offices, have advocated positions different from that of the United States and, in some instances, they have advocated views antagonistic to the Government. The Department of Justice cannot use such persons as its witnesses in trial with the result that duplicate studies may have to be prepared.

I emphasize the memo's own language that duplicate studies may have to be prepared.

So, according to at least one Department official, the study in question was clearly designed with the intention of duplicating the existing study, and for reasons only the Departments of Interior and Justice can fathom. I, for one, am interested in learning more about experts hired by the BIA—from which Government positions do they differ and how do they antagonize the Government? Apparently, the possibility that their expert opinion is a correct one has been rejected by the Department that is supposed to represent the interest of Indian tribes.

Are the Government's positions mysteriously superior? And who, in this case, is the Government referred to in the memo? Is it Secretary Watt? Will duplication of a part, or most, or all, of the study, assure expert opinions to coincide with the mysterious positions advocated by the United States?

The second issue is the manner in which funds were initially released to pay for this contract. The Indian Affairs Select Committee staff met on February 22 of this year with BIA staff, to discuss budget items that were to be covered at the committee's oversight hearings on the following day, February 23. At the February 22 meeting, the general counsel of the committee put BIA staff on notice that both I and Senator Andrews, Chairman of this committee, had serious concerns about the contract and that the BIA could expect questions, either written or oral, on this matter at the February 23 hearing. Because of time restraints there were no oral questions, but Chairman Andrews did tell the BIA that written questions would be submitted. Two days later, on February 25, the BIA Telexed to the Billings Area Office an authorization to spend $500,000 for this contract.

On March 3, I learned of this transfer of funds and wrote a letter to Secretary Watt, expressing my concern and requesting that no funds be spent until the matter could be investigated and resolved. The reply to my letter was not forthcoming until April 8, at which time Mr. Watt informed me that the BIA had instructed the Billings Area Office to suspend all activity and to pay no more than $100,000 to CH2M Hill.

Since then, as of March 23, vouchers have been submitted by this company for $30,725.

The third issue here arises because on March 9, after my letter to Secretary Watt, the BIA restored $350,000 to the water resource program, which it had obligated for this contract and substituted $500,000 from the Rights Protection Litigation Fund for this contract.

The latter funding source is the only proper source for contracts to assemble data for litigation purposes. I further note that not only was the obligation of water resource money improper and illegal for purposes of litigation, the Department of the Interior's own reasoning for the duplicate study was justified by the Department officials to prepare litigation.

The original obligation of funds from the water resources program was illegal, which would not have been rectified were it not for the committee's comunication to the BIA that the committee would undertake a full-scale investigation.

Fourth, the Blackfeet Tribe has maintained since June 1981, when it first learned of a proposed contract, that it was opposed to the contract for two reasons: No 1, the work had already been done; and No. 2, the money could be better spent by the tribe in planning for water development.

The tribe first raised its objection to a second study in the summer of 1981 in response to a request for proposal issued in June of that year. In fact, I also voiced my concern to the Department over 18 months ago, in October 1981. The request for proposal was subsequently cancelled.

The second request for proposal, leading to this CH2M Hill contract, was issued in August 1982 when the tribe again contacted me and I once more inquired about the justification for letting this contract. It makes me wonder how many times I have to write to Secretary Watt to kill one contract for $1.2 million, that is repetitious of a study already on file, available, and apparently a good study.

The BIA responded only that a final decision was expected by January 20, 1983. I quote:

> No contract has been awarded for additional soils studies at Blackfeet. That matter and related issues are under consideration currently here in the Department. We expect a final decision by January 20, which will afford the opportunity to explore these matters in depth with Chairman Old Person prior to that date.

Frankly, I interpreted this letter to mean that a decision on whether or not to let a contract would be made by January 20, 1983, and that those of us who had written to Secretary Watt and to the Assistant Secretary, would be advised on whether or not the contract was essential. In fact, without futher discussion and without a yes or no out of the Department, the contract was awarded on January 31, 1983.

The committee would like to know how the matter was resolved; that is, the amount of discussion with the tribe about their refusal to allow access to their land. Lack of access would prevent any soil studies. What were the other considerations referred to in the quote I have just read.

Apparently, the considerations were so overriding that they took precedence over the Government's responsibility to heed the tribal council's resolution denying access to their land for a second study.

We also need to learn what consultation took place, if any, with the tribe when they maintained for 2 years their opposition to a new soil study.

Lastly, there have been former BIA employees who became paid consultants to CH2M Hill, Inc., or, former CH2M Hill employees who are now BIA employees. I am going to develop a line of questioning to determine the facts here. Neither I, nor this committee, can accurately judge the propriety of this type of interchange of people between CH2M Hill and the Department of the Interior unless we are knowledgeable on the facts. We trust that those facts are clear and available today.

This entire issue has many facets that need to be explored to get the clear picture of why this contact was let, why the Department of Interior used the wrong funding source, why the Department insisted on letting the contract in spite of its awareness that the tribe involved would resist entry on to the reservation by the contractor, and why the money was obligated once this Committee said hold off.

This issue has been mismanaged from the beginning. More than $1 million may seem like small potatoes to budget people in Washington, who are used to looking at billions of dollars. But the public trusts and expects that its money will be spent wisely and frugally, whether it be for an expensive multibillion dollar weapons system or for a contract to conduct soil studies.

This money could be put to good use by the Blackfeet Tribe, or any other tribe for that matter, or for that matter also by the taxpayers, for very worthwhile purposes. Instead, it appears that the Department of the Interior, for whatever reason, has insisted that it be spent in a manner determined by them, without regard to the tribe's position, without regard to this committee's feelings and desire for knowledge, and for purposes that are duplicative and wasteful and, until corrected after the whistle was blown, was drawn from earmarked appropriated funds that would be an illegal expenditure.

Now there are a lot of things to discuss here today and I am going to try to get through this witness list. We will start right back at the beginning with the original study conducted in the 1970's with our first witness, Joe Maierle of Morrison-Maierle, Inc., of Helena, Mont.

Joe, please summarize your testimony. We are at the start, but we are nowhere near the end of this day of testimony and we would like to complete this testimony and questioning, particularly of the Department, before the morning is over. So would you please proceed.

STATEMENT OF JOE A. MAIERLE, CHAIRMAN OF THE BOARD, MORRISON-MAIERLE, INC., HELENA, MONT., ACCOMPANIED BY: MICHAEL B. KACZMAREK, CHIEF GEOLOGIST AND SOIL SCIENTIST, MORRISON-MAIERLE, INC., HELENA, MONT.

Mr. MAIERLE. Mr. Chairman, my name is Joe Maierle and I am the chairman of the board of Morrison-Maierle, Inc., with headquarters located in Helena, Mont.

I was shocked and outraged at the conduct of the United States Department of Justice and the Bureau of Indian Affairs toward my firm. We have been threatened with litigation and the credibility of the firm and its employees have been attacked. It is clear that the attacks upon the firm of Morrison-Maierle, Inc. stem from the intention of the Bureau of Indian Affairs and the Department of Justice to force wasteful and duplicative soils investigations and classification studies——

Senator MELCHER. Please speak up. Perhaps you had better speak more directly into the microphone.

Mr. MAIERLE. OK, I am sorry.

The charade being developed by the Bureau of Indian Affairs and the Department of Justice is government at its worst. The Blackfeet Tribe, supposedly the beneficiary of the actions of the Government, strongly oppose the actions being forced upon it. The work proposed by the Bureau of Indian Affairs and the Department of Justice is unnecessary.

The people of Montana, and particularly non-Indians, potentially impacted by the Blackfeet water rights claims are being misled into thinking the Government is spending millions of dollars to advance and support water right claims of the Blackfeet. This is untrue. Based upon my personal examination and reports from employees of my firm, I am convinced that the primary objective of the Bureau of Indian Affairs and the Department of Justice is to reduce the water right claims developed by my firm for the Blackfeet Tribe and to protect the Secretary of the Interior from confrontation over the conflicting water rights of the Blackfeet Tribe and the Milk River Federal Reclamation project.

The conclusion that the Government intends to reduce the Blackfeet water rights is supported by the following findings developed by the staff of my firm:

1. Review of the claims filed by the Bureau of Indian Affairs by the State of Montana of filings strenuously opposed by the Blackfeet Tribe, discloses no claim for waters of the Saint Mary's or Milk Rivers. These are principal streams of the Blackfeet Indian Reservation that are being used exclusively by the Milk River project.

2. In the Federal cases filed by the Department of Justice in the United States District Court in Great Falls, Mont., no claims were made for any future uses of the Milk River or its tributaries on behalf of the Fort Belknap Indians. All water of those streams was claimed instead for the Bureau of Reclamation. Clearly, the Department of Justice cannot represent the Bureau of Reclamation on the Saint Mary's River, Milk River and tributaries and simultaneously represent any interest of the Indians.

The Department of Justice and the Bureau of Indian Affairs have asserted that the need for additional land classification studies stems from at least two factors. First, the Blackfeet Tribe has chosen not to negotiate its water rights with the State of Montana. Consequently, the Department of Justice reasons that it must proceed with preparation for litigation as the only alternative available to the Blackfeet.

Second, the Department of Justice and the Bureau of Indian Affairs have determined that the Morrison-Maierle Irrigable Land Classification Study was inadequate for litigation.

The Bureau of Indian Affairs recently clarified its position on the technical requirements for irrigable land classification studies. It was stated, in effect, by the same Bureau of Indian Affairs official personally responsible for the preparation of the claim for the Blackfeet Tribe filed with the State of Montana, that:

1. If a tribe negotiates with the State of Montana, the level of preparation in the Morrison-Maierle investigation is too detailed.

2. If a tribe chooses not to negotiate, such as the Blackfeet Tribe, preparation must be in contemplation of litigation, and the Morrison-Maierle irrigable acreage determinations lack sufficient detail and are inadequate.

My firm developed sound scientific and engineering information with respect to the irrigability capability of the lands of the Indian Reservation. The Bureau of Indian Affairs and the Department of Justice have arbitrarily and capriciously developed the most rigid criteria conceivable for determination of water right claims for the litigation while developing the most relaxed of criteria for negotiation.

The proposed expenditure by the Bureau of Indian Affairs of $1.2 million or more for a wasteful study on the Blackfeet Reservation is clear evidence that there is total disregard for the scientific and engineering reason in this matter. The Department of Justice is seeking to diminish the credibility of the Morrison-Maierle work by a wasteful expenditure of funds.

The water resource engineers of Morrison-Maierle have been actively involved in the determination of future water availability within the Yellowstone River Basin of Montana. The process utilized by the Irrigation Conservation Districts to arrive at the quantities of water to be reserved for future irrigation processes is well understood.

We can state with definity that the "Order of the Montana Board of Natural Resources and Conservation" reserving some 800,000 acre-feet per year of Yellowstone River water for irrigation purposes was predicated upon a reasonable assessment of irrigable acreage in the Yellowstone River Basin. The criteria used in the Yellowstone River Basin for determining the quantity of water to be reserved for future irrigation was far less rigid than proposed by the Department of Justice and the Bureau of Indian Affairs for the Blackfeet Indian Reservation.

Attention is also directed to the fact that the history of land classification studies recently developed by the Bureau of Indian Affairs states that criteria or the rigid nature proposed by the Department of Justice was never considered in the design of the Two-Medicine, Badger-Fisher, and Birch Creek units of the Blackfeet Irrigation Project.

It is the philosophy of the Department of Justice that those existing irrigation projects would be examined in the comprehensive soils investigation using new irrigability criteria. Apparently, lands now being irrigated that would not meet that criteria imposed by the Department of Justice would be excluded from water rights claims. This further demonstrates the arbitrary and capricious conduct of the Department of Justice and the Bureau of Indian Affairs in developing new criteria to be used upon the Blackfeet Indian Reservation.

The water resource experts of my firm have considerable expertise throughout the western United States. Those experts have appeared in Federal administrative hearings, Federal Court cases, as committee members of international commissions and in public hearings respecting irrigable lands, water requirements for irrigation, hydropower and other matters related to water right adjudication.

The soil scientist principally responsible for the determination of the irrigable acreage on the Blackfeet Indian Reservation has been personally responsible for the irrigable land classification of millions of acres of land in Montana, North Dakota, South Dakota, Iowa, Washington, Idaho, and Arizona. Our engineers have not only determined the lands capable of irrigation, they have conducted feasibility investigations, prepared designs and specifications, and operated and managed irrigation projects on thousands of acres throughout the western United States.

Our investigations for the Bureau of Indian Affairs in Montana from 1971 through 1979 were consistently praised by that agency. Our contracts, which began in 1971, were regularly modified to provide for continuation of our services on the basis that our work was satisfactory to the Government.

In 1978, however, we testified in the United States District Court for Eastern Washington with respect to irrigation water requirements for the Colville Confederated Tribes. The experts of my firm testified that slightly in excess of four acre-feet per acre were required for irrigation of the Colville lands.

The independent findings of the experts of my firm compared well with the findings of Washington State University, and recent decrees of water rights from the State Courts of Washington. My experts were confronted by attorneys and experts for the Department of Justice that insisted the water requirements developed by my firm were too high and should be reduced to approximately three acre-feet per acre.

Government witnesses testified that irrigation water requirements for the Colville Confederated Tribes should be as low as 2.5 acre-feet per acre. The experts of my firm felt that the investigations and findings were reasonable and did not submit to the demands of the Department of Justice to reduce the irrigation water requirements.

Shortly after our testimony on behalf of the Colville Confederated Tribes, the Department of Justice and the Department of Interior issued memorandums to the effect that firms not willing to conform to demands of the Department of Justice, irrespective of the lack of scientific basis for those demands, should not be hired as experts for the United States. It was at this point in time that the relationship of my firm with the Bureau of Indian Affairs began to deteriorate.

Our work was never criticized, but we were effectively excluded from further contracting through the Bureau of Indian Affairs on water resource and water rights matters.

It is a national disgrace that the Department of Justice and the Bureau of Indian Affairs are proceeding so recklessly with the small amount of funding available in the Federal budget to undertake duplicate and wasteful investigations with no apparent purpose, other than to reduce the claims of the Indians and to force the political objectives of the Department of Justice upon the Indians not wishing to negotiate.

On the Blackfeet Indian Reservation it is clearly the purpose of the Department of Justice to fully represent the claims of the Bureau of Reclamation against the claims of the Indians. The recent attack by the Bureau of Reclamation upon the land classification study of my firm on the Blackfeet Reservation loses all credibility in view of the desire of the Bureau of Reclamation to suppress the development of Blackfeet water resources.

The assertions of the Bureau of Indian Affairs that the soil data used and the investigation conducted are inadequate in detail contradict the very policies provided to Morrison-Maierle, Incorporated as the definitive guidelines for the requirements of the investigations and reflect the aggressive efforts of the Bureau of Indian Affairs to limit the claim of the Blackfeet Tribe to water rights in the upper Missouri River Basin.

The contention of the Bureau of Indian Affairs that the Soil Conservation Service data is not an adequate description of the soils on the reservation, violates every principle of commonsense, when those same soils are presently being irrigated and have been irrigated on lands within the reservation and lands contiguous to the reservation since the 1920's.

If the soils data provided by the Soil Conservation Service in one of the most modern soil surveys conducted in the State of Montana, and the collective experience of numerous farmers irrigating those same soils for more than 50 years are an inadequate basis for determining irrigability, then I must conclude that many of the lands currently being irrigated by existing projects may be potentially classified as nonirrigable by the new investigations being conducted by the Bureau of Indian Affairs.

Mr. Chairman, I thank you for the time that you afford me to present my testimony. I have Mike Kaczmarek, our chief geologist and soil scientist here. And if you have any questions we will try to answer them for you.

Senator MELCHER. Without objection, all of your text will be made a part of the record and the prepared statement by Mike Kaczmarek will also be made a part of the record.

[The prepared statements of Joe A. Maierle and Michael B. Kaczmarek follow. Testimony resumes on p. 33.]

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENTATE
STATEMENT
OF
JOE A. MAIERLE
CHAIRMAN, BOARD OF DIRECTORS
MORRISON-MAIERLE, INC.
CONSULTING ENGINEERS
HELENA, MONTANA

Mr. Chairman and Members of your Committe, my name is Joe A. Maierle, I am Chairman of the Board of Morrison-Maierle, Inc. Consulting Engineers with headquarters located in Helena, Montana and branch offices in Billings, Bozeman and Kalispell, Montana.

I am shocked and outraged at the conduct of the United States Department of Justice and Bureau of Indian Affairs toward my firm. We have been threatened with litigation, and the credibility of the firm and its employees have been attacked. It is clear that the attacks upon the firm of Morrison-Maierle, Inc. stem from the intention of the Bureau of Indian Affairs and the Department of Justice to force wasteful and duplicative soils investigations, land classification studies and other studies upon the Blackfeet Indian Tribe.

The charade being developed by the Bureau of Indian Affairs and Department of Justice is government at its worst. The Blackfeet Tribe, supposedly the beneficiary of the actions of the government, strongly opposes the actions being forced upon it. The work proposed by the Bureau of Indian Affairs and Department of Justice is unnecessary. The people of Montana, and particularally non-Indians potentially impacted by Blackfeet water right claims are being misled into thinking the government is spending millions of dollars to advance and support water right claims of the Blackfeet. This is untrue. Based upon my personal examination and reports from employees of my firm, I am convinced that the primary objective of Bureau of Indian Affairs and Department of Justice is to reduce the water right claims developed by my firm for the Blackfeet Tribe and to protect the Secretary of Interior from confrontation over the conflicting water rights of the Blackfeet Tribe and the Milk River Federal Reclamation Project.

The conclusion that the government intends to reduce the Blackfeet water rights is supported by the following findings developed by the staff of my firm:

(1) Review of the claims filed by the Bureau of Indian Affairs with the State of Montana, a filing strenuously opposed by the Blackfeet Tribe, discloses no claim for waters of the Saint Mary's or Milk rivers. These are principle streams of the Blackfeet Indian Reservation that are being used exclusively by the Milk River Project.

(2) In the Federal cases filed by the Department of Justice in the United States District Court in Great Falls, no claims were made for any future uses of the Milk River or its tributaries on behalf of the Fort Belknap Indians. All water of those streams was claimed instead for the Bureau of Reclamation. Clearly, Department of Justice cannot represent Bureau of Reclamation on the Saint Mary's River, Milk River and tributaries and simultaneously represent any interest of the Indians.

(3) Employees of my firm were informed by prospective contractors for Department of Justice that the new investigations would not provide for study of the number of irrigable acres identified in the Morrison-Maierle Irrigable Land Classification Study. The prospective contractors were in our office and were provided with a review of our soils work and were with an employee of Bureau of Indian Affairs designated by the Billings Area Director at the time that statement was made. It was obvious that the Department of Justice intended to reduce the claim developed for the Blackfeet Tribe by Morrison-Maierle, Inc.

The Department of Justice and Bureau of Indian Affairs have asserted that the need for additional land classification studies stems from at least two factors. First, the Blackfeet Tribe has chosen not to negotiate its water rights with the State of Montana. Consequently, Department of Justice reasons that it must proceed with preparation for litigation as the only alternative available to the Blackfeet. Secondly, Department of Justice and Bureau of Indian Affairs have determined that the Morrison-Maierle Irrigable Land Classification Study was inadequate for litigation.

Bureau of Indian Affairs recently clarified its position on the technical requirements for irrigable land classification studies. It was stated, in effect, by the same Bureau of Indian Affairs official personally responsible for preparation of the claim for the Blackfeet Tribe filed with the State of Montana, that:

(1) If a Tribe negotiates with the State of Montana, the level of preparation in the Morrison-Maierle investigation is too detailed. The Tribe should make very high claims of irrigable land and water duty, and very little specific information should be presented in the negotiation process. The chances of success are good.

(2) If a Tribe chooses not to negotiate, such as the Blackfeet Tribe, preparation must be in contemplation of litigation, and the Morrison-Maierle irrigable acreage determinations lack sufficient detail and are inadequate. Tribes chosing not to negotiate should not develop claims that are too high because the Federal Courts will substantially reduce those claims in the litigation process.

My firm developed sound scientific and engineering information with respect to the irrigable capability of the lands on the Blackfeet Indian Reservation. The Bureau of Indian Affairs and the Department of Justice have arbitrarily and capriciously developed the most rigid of criteria conceivable for determination of water right claims for litigation while developing the most relaxed of criteria for negotiation. The Department of Justice and Bureau of Indian Affairs are demonstrating a systematic effort to prove the statements they make throughout the western United States that "litigation is costly and time consuming and negotiation is inexpensive and expeditious."

The proposed expenditure by Bureau of Indian Affairs of 1.2 million dollars or more for a wasteful study on the Blackfeet Reservation is clear evidence that there is total disregard for scientific and engineering reason in this matter. The Department of Justice is seeking to diminish the credibility of the Morrison-Maierle work by a wasteful expenditure of funds. Moreover, the Department of Justice is seeking to prove that litigation is far more costly than negotiation.

The water resource engineers of Morrison-Maierle, Inc. have been actively involved in the determination of future water availability within the Yellowstone River Basin of Montana. The process utilized by the Irrigation Conservation Districts to arrive at the quantities of water to be reserved for future irrigation processes is well understood. We can state with definity that the "Order of the Montana Board of Natural Resources and Conservation" reserving over 800,000 acre-feet per year of Yellowstone River water for future irrigation purposes was predicated upon a reasonable assessment of irrigable acreage in the Yellowstone River Basin. The criteria used in the Yellowstone River Basin for determining the quantity of water to be reserved for future irrigation was far less rigid than proposed by the Department of Justice and Bureau of Indian Affairs for the Blackfeet Indian Reservation. It is unjust and unfair that the United States imposes an extremely rigid, costly, time consuming and wasteful investigation upon the Blackfeet Indians, while non-Indians within the State are permitted to reserve water for future purposes utilizing much less rigid tests.

Attention is also directed to the fact that the history of land classification studies recently developed by the Bureau of Indian Affairs states that criteria of the rigid nature proposed by the Department of Justice was never considered in the design of the Two-Medicine, Badger-Fisher and Birch Creek units of the Blackfeet Irrigation Project. It is the philosophy of the Department of Justice that those existing irrigation projects would be examined in a comprehensive soils investigation using new irrigability criteria. Apparently, lands now being irrigated that would not meet the criteria imposed by the Department of Justice would be excluded from water rights claims. This further demonstrates the arbitrary and capricious conduct of the Department of Justice and Bureau of Indian Affairs in developing new criteria to be used upon the Blackfeet Indian Reservation.

The water resource experts of my firm have considerable expertise throughout the western United States. Those experts have appeared in Federal administrative hearings, Federal Court cases, as committee members of international commissions and in public hearings respecting irrigable lands, water requirements for irrigation, hydropower and other matters related to water right ajudication. The soil scientist principally responsible for determination of the irrigable acreage on the Blackfeet Indian Reservation has been personally responsible for the Irrigable land classification of millions of acres of land in Montana, North Dakota, South Dakota, Iowa, Washington, Idaho and Arizona. Our engineers have not only determined the lands capable of irrigation, they have conducted feasibility investigations, prepared designs and specifications, and operated and managed irrigation projects on thousands of acres throughout the western United States.

Our investigations for the Bureau of Indian Affairs in Montana from 1971 through 1979 were consistently praised by that agency. Our contracts, which began in 1971, were regularly modified to provide for continuation of our services on the basis that our work was satisfactory to the government. In 1978, however, we testified in the United States District Court for Eastern Washington with respect to irrigation water requirements for the Colville Confederated Tribes. The experts of my firm testified that slightly in excess of 4 acre-feet per acre were required for irrigation of the Colville lands. The independent findings of the experts of my firm compared well with findings of Washington State University and recent decrees of water rights from the State Courts of Washington. My experts were confronted by attorneys and experts for the Department of Justice that insisted the water requirements developed by my firm were too high and should be reduced to approximately 3 acre-feet per acre. Government witnesses testified that irrigation water requirements for the Colville Confederated Tribes should be as low as 2.5 acre-feet per acre. The experts of my firm felt that the investigations and findings were reasonable and did not submit to the demands of the Department of Justice to reduce the irrigation water requirements.

Shortly after our testimony on behalf of the Colville Confederated Tribes, the Department of Justice and Department of Interior issued memorandums to the effect that firms not willing to conform to the demands of the Department of Justice, irrespective of the lack of scientific basis for those demands, should not be hired as experts for the United States. It was at this point in time that the relationship of my firm with the Bureau of Indian Affairs began to deteriorate. Our work was never criticized, but we were effectively excluded from further contracting through the Bureau of Indian Affairs on water resource and water rights matters. Fortunately, we have been able to continue working for a small number of tribes and have concentrated exclusively on the development of small irrigation and other water resource projects that will provide income to those tribes in perpetuity.

It is a national disgrace that the Department of Justice and Bureau of Indian Affairs are proceeding so recklessly with the small amount of funding available in the Federal budget, to undertake duplicate and wasteful investigations with no apparent purpose other than to reduce the claims of the Indians and to force the political objectives of the Department of Justice upon the Indians not wishing to negotiate. On the Blackfeet Indian Reservation it is clearly the purpose of the Department of Justice to fully represent the claims of the Bureau of Reclamation against the claims of the Indians. The recent attack by the Bureau of Reclamation upon the land classification study of my firm on the Blackfeet Reservation losses all credibility in view of the desire of the Bureau of Reclamation to suppress the development of Blackfeet water resources.

I respectfully petition this Committee to examine the conduct of the Department of Justice and Bureau of Indian Affairs in this matter, we believe the only reasonable manner in which to expend the available Federal funding for Indian water resources is to proceed to construction of small hydropower and irrigation projects on Blackfeet. There are projects on the reservation that could be implemented with the money the Department of Justice and Bureau of Indian Affairs proposes to utilize for otherwise wasteful investigations.

I cannot tell you the magnitude of the continuing and irreparable damage to my firm. The damages have been grave, and I petition this committee to utilize its judgement to insure that other firms are not similarly damaged.

Joe Maierle

Joe A. Maierle

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
STATEMENT
OF
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HELENA, MONTANA

I am Michael B. Kaczmarek, Chief Geologist and Soil Scientist for Morrison-Maierle, Inc., Helena, Montana. I welcome this opportunity to present to the Committee facts pertaining to the wasteful duplication of soil surveys and irrigable land classification on the Blackfeet Indian Reservation in Montana to the detriment of the Blackfeet Tribe.

This matter goes far beyond the issues of duplication of investigations already completed and the wasteful expenditure of public money. The contract to "Identify, classify, locate, and inventory all arable lands within the exterior boundaries of the Blackfeet Indian Reservation in Montana" as awarded by the Billings Area Office of the Bureau of Indian Affairs on January 30, 1983 is a concerted effort on the part of the Bureau of Indian Affairs to reduce the claims of the Blackfeet Tribe to water rights on their lands, an effort stemming from the conflict of interest created by the ongoing use of water from the Blackfeet Indian Reservation to irrigate non-Indian lands on Bureau of Reclamation projects downstream from the Indian reservation.

The approach being used under the January 30, 1983 contract reflects a basic shift in the Bureau of Indian Affairs policies regarding irrigable land classification in support of Indian claims to water rights and is intentionally designed to severely limit the number of acres of land determined to be irrigable on the Blackfeet Indian Reservation in order to conceal the conflict of interest stemming from the attempts of the Department of the Interior and the United States Department of Justice to represent both the rights of the Blackfeet Tribe and the ongoing commitment of the Federal reclamation projects to use the same supplies of water. The shift in the Bureau of Indian Affairs direction in these matters has caused them to viciously attack the quality and integrity of work accomplished by Morrison-Maierle, Inc., under their direction and in accordance with their former policies, and to make slanderous statements about the ethics of the Morrison-Maierle, Inc. involvement in this matter, all for the purpose of destroying our credibility as experts regarding the classification of irrigable land on the Blackfeet Indian Reservation.

As a qualified and experienced soil scientist, I have personally completed investigaitons to determine the number of acres of irrigable lands on the Blackfeet Indian Reservation. My findings were based on scientific criteria widely accepted and applied by Federal and State agencies and on detailed soils information compiled by the United States Department of Agriculture, Soil Conservation Service, and now published by the Government Printing Office as "Soil Survey of Glacier County Area and Part of Pondera County, Montana". My identification and classification of the irrigable lands on the Blackfeet Indian Reservation is based on the ultimate criteria that the lands identifed as irrigable are eminently suitable for management under sustained agricultural irrigation and that the application of irrigation water to the lands so classified will result in an increase in the productivity of the land.

The assertions of the Bureau of Indian Affairs that the soils data used and the investigations conducted are inadequate in detail contradict the very policies provided to Morrison-Maierle, Inc. as the definitive guidelines for the requirements of the investigations that I personally conducted and reflect the aggressive efforts of the Bureau of Indian Affairs to limit the claim of the Blackfeet Tribe to water rights in the Upper Missouri River Basin. As a qualified soil scientist and a man who grew up working on irrigated farms near and adjacent to the Blackfeet Indian Reservation, I state unequivocally that the massive expenditure of money, as much as 1.2 million dollars, and the duplication of existing information, all supposedly necessary to "qualify an expert" is a sham, and is unnecessary for the determination of the amount and location of irrigable lands on the Blackfeet Indian Reservation.

The contention of the Bureau of Indian Affairs that the Soil Conservation Service soils data is not an adequate description of the soils of the Blackfeet Indian Reservation violates every principal of common sense when those very same soils are presently being irrigated and have been irrigated on lands within the Blackfeet Indian Reservation and on lands contiguous to the reservation since the 1920's. I have personally worked as a farmer and irrigator on farms in that area and I can assure this Committee that the successful development and management of those farms did not require the expenditure of hundreds of thousands of dollars to drill a limited number of holes, duplicate known information, and substitute a rigidly structured procedural system of rules and rote classification in place of reason and practical judgement in determining the suitability of the lands irrigabed by those farmers. If the soils data provided by the Soil Conservation Service, in one of the most modern soil surveys conducted in the State of Montana, and the collective experience of numerous farmers in irrigating those same soils for more than 50 years are an inadequate basis for determining irrigability, then I must conclude that many of the lands currently being irrigated by existing irrigation projects may be potentially classified as nonirrigable by the new investigations being conducted by the Bureau of Indian Affairs, since they are the very same types of soils that I have determined to be irrigable elsewhere on the reservation where the Bureau of Indian Affairs says my investigations were inadequate. I do not believe that any reasonable man, being aware of the existing irrigation projects on and adjacent to the Blackfeet Indian Reservation can conclude that the Scope of Work set forth in the January 30, 1983 contract is required to determine the extent and distribution of irrigable lands on the Blackfeet Indian Reservation in view of the overwhelming abundance of scientific and practical knowledge to the contrary.

It is clear, in view of the history of conflicting interests between the development of Indian irrigation projects on the reservation and the development of Bureau of Reclamation irrigation projects, both existing and planned, downstream from the Blackfeet Indian Reservation on the Milk and Marias Rivers, that the Technical Specifications contained in the Statement of Work for the January 30, 1983 contract require a deceitful application of Bureau of Reclamation land classification principals and standards that can have no other consequence than to reduce the number of acres of reservation lands that I have classified as irrigable. The predicates for identifying and classifying irrigable lands under the current Bureau of Indian Affairs approach are founded in an attack on all of the work that has gone before based on conjectural and speculative assumptions regarding the feasibility of projects which have not been defined and which cannot be defined without the authorization of the Blackfeet Tribe and without specific legislative definition of the policies and circumstances under which such projects would be constructed and operated.

I am amazed at the attacks that have been made by the Bureau of Indian Affairs upon the credibility of my work and upon the ethics of myself and Morrison-Maierle, Inc. for questioning the descretion of their current policies regarding the claims of the Blackfeet Tribe to water rights. I am amazed at the misleading and deceptive nature of the statements that the Bureau of Indian Affairs is making in purporting to represent the interests of the Blackfeet Tribe while aggressively pursuing a course of conduct that is in direct and obvious conflict with the interests of the Blackfeet Tribe by virtue of substantially reducing their basis for claiming water rights. I am amazed at the potentially disasterous position that the Bureau of Indian Affairs has placed Morrison-Maierle, Inc. in by attacking the credibility and adequacy of our work which was completed with their fullest cooperation, knowledge, and support.

There is no justification in the technology of soil science, agricultural engineering, or land classification for the position currently advocated by the Bureau of Indian Affairs. For lack of a reasonable justification in technology, I must conclude that the attacks made on the work performed by myself and Morrison-Maierle, Inc. (work that was completed with the full support and approval of the Billings Area Office of the

Bureau of Indian Affairs) are inspired by a politically motivated reversal of the policies and guidelines under which we conducted our investigations as consultants to the Bureau of Indian Affairs. The current conduct of the Bureau of Indian Affairs, in regards to quantification of the acreage of irrigable lands on the Blackfeeet Indian Reservation, is evidence that the reversal in the policies under which we worked was motivated by the continuing conflict of interest on the part of the Department of the Interior and the United States Department of Justice regarding the allocation of waters flowing from the Blackfeet Indian Reservation and by the pressing need of those agencies to reduce the Blackfeet Tribe's claim to water rights in order to mitigate the conflict of interest in view of the impending necessity to litigate the Indian claims against the Bureau of Reclamation uses, present and future, of the same water.

I am not unmindful of the responsibilities of an expert witness in preparing evidence for litigation or of the requirements which that evidence must satisfy. I have worked as an expert witness, testifying to the irrigable land classification and irrigable land acreages on Indian reservations in other instances. I have found consistantly, across the western United States, that the current policies of the Bureau of Indian Affairs and the United States Department of Justice are to actively work against the Tribes by advocating positions adverse to the Tribes' claims.

I relate these matters to this Committee to show that I am personally acquainted with the consequences of the conflict of interest the Bureau of Indian Affairs and the United States Department of Justice have in trying to represent the interests of the Indians against the interests of Federal water projects; the consequences being the willful and intentional misrepresentation of the Indian water rights claims by means of obstensibly detailed and technologically advanced investigations designed to create the impression of a diligent effort on the part of the Bureau of Indian Affairs to represent the Indian claims when in reality the methods used are preordained to severely limit the basis for the Indian water right claims.

My personal involvement in this matter began in 1974 when Morrison-Maierle, Inc., under contract to the Bureau of Indian Affairs, Billings

Area Office, assigned me to develop specific critria for determining the suitability of soils on the glaciated northern plains of Montana for management under sustained irrigation. Morrison-Maierle, Inc. was under contract at that time to conduct comprehensive resources inventory programs on Indian trust lands on four Indian reservations in northern Montana including the Blackfeet Indian Reservation. The stated purpose of the resources inventory investigations was to compile information regarding Indian land and water resources for future use as evidence in determining Indian claims to water rights. The directions provided to Morrison-Maierle, Inc. and to me, by the Bureau of Indian Affairs, regarding preparation of the resources inventory data stated explicitly that all of the resources inventory work was being completed in contemplation of litigation of Indian water rights claims and was necessarily to be suitable for use as evidence.

The development of irrigable soils criteria and the subsequent use of the criteria to classify lands on the Blackfeet Indian Reservation and other Indian reservations in Montana and other states was a single element of the comprehensive water resources inventory investigations. We were requested to develop irrigable land classification criteria applicable specifically to the Indian reservation lands in northern Montana because the Billings Area Office personnel were concerned that the criteria in use at the time by the Bureau of Indian Affairs were too general in nature. The guidance provided to Morrison-Maierle, Inc. in regards to development of a specific set of criteria applicable to the northern Montana Indian reservations, including Blackfeet, Rocky Boys, Fort Belknap, and Fort Peck was explicit as follows:

> "When specific consideration is not being given to enlargement of present Indian irrigation projects or to the establishment of new Indian irrigation projects, one of the following alternatives for land classification will be used:

A. Lands of each reservation, assuming availability of adequate water, may be classified for irrigation in accordance with the most recent criteria established in the Land Use Capability Classification system used by the U.S. Department of Agriculture. Irrigable land determinations established in this manner will provide a basis for determining future water needs as projected by prudent land operators, competent technicians, and most recent research data.

B. As a second alternative, the Irrigation Soils Classes, as set forth on pages 101 and 103 of the Proceedings, Water Resources Council, Irrigation Land Classification Seminar, Salt Lake City, Utah, July 18-19, 1967 (Supplemented March 18, 1968), may be used as standards."[1/]

and,

> "Soil data used for determining land class for litigation purposes [emphasis added] may be of a reconnaissance or semi-reconnaissance character....The Bureau of Indian Affairs soil and range inventories and U.S. Department of Agriculture Soil Conservation Service soil surveys [emphasis added], both detailed and reconnaissance, may be used for land classification, after any needed updating of the data has been completed."[2/]

The proceedings of the Land Classification Seminar, cited in the Commissoner's letter of September 16, 1971, states in regards to determination of irrigation soils classes as follows:

[1/] Commissioner of Indian Affairs to Area Directors, Letter dated September 16, 1971, Land Classification Standards for Water Resource Inventories made by the Bureau of Indian Affairs.

[2/] Ibid., Commissioner, September 16, 1971.

> "1. Irrigation soil classes are based primarily on the relatively permanent soil properties such as effective depth, surface texture, available water holding capacity, permeability, soil temperature, soil slope, type of clay mineral, effects of past erosion, etc., that influence the suitability of the soil for continued use under irrigation."[3/]

and,

> "7. Soil classes are established without regard to water access, water quality, distance from market, kinds of roads, skill or resources of individual operators, and other non-soil-related factors."[4/]

In addition to the latter correspondence provided to us by the Billings Area Office of the Bureau of Indian Affairs, as specific policy guidance regarding irrigable land classification criteria, we were furnished the following direction,

> "During the meeting in Billings on June 5, with Mr. Donald Redd officiating, a discussion was held regarding distinction between 'arrable [sic]' land and 'irrigable land', with the conclusion that, insofar as litigation requirements are concerned, the term 'irrigable' land should be used, with emphasis on irrigation capability, irrespective of water availability...we feel from a time standpoint that it would be best to devote first attention to the ongoing of the soils studies, inasmuch as the gross acreage will probably require the total water supply available."[5/]

[3/] Water Resources Council, Irrigation Land Classification Seminar, Proceedings, Salt Lake City, Utah, July 18-19, 1967, (Supplemented March 18, 1968), pp. 101-103.

[4/] Ibid., pp. 101-103.

[5/] James Canan, Area Director, Draft letter to Mr. Donald Redd, Soliciter, Department of the Interior, Washington, D.C., June 9, 1975.

In accordance with the guidance stated in the foregoing correspondence provided to Morrison-Maierle, Inc. as irrigable land classification policies and direction by the Billings Area Office, I proceded to compile irrigable soils classification criteria specifically for the four northern Montana reservations, including the Blackfeet Indian Reservation. The irrigable soils classification criteria I developed for specific use on the Blackfeet Indian Reservation and other reservation lands were based on irrigable land classification criteria in widespread use by Federal and State agencies and commonly accepted as conventional practices and procedures by professional soil scientists. The sources of irrigable land classification criteria I used were as follows:

1. Irrigation Soil Classes Criteria, pages 101 and 103 of the Preceedings, Water Resources Council, Irrigation Land Classification Seminar, Salt Lake City, Utah, July 18-19, 1967, (Supplemented March 18, 1968).

2. The Department of Agriculture, Soil Conseration Service, descriptions and definitions of Land Use Capability Classification System, Soil Conservation Service Standards.

3. Principals and Standards set forth in the United States Department of Interior, Bureau of Reclamation Manual, Volume V, Irrigated Land Use, Part 2, Land Classification.

4. Reconnaissance Land Classification Specifications, State Water Plan, Missouri Basin Region, Montana, Montana Water Resources Board, Land Classification Section.

5. Bureau of Indian Affairs, letter from the Commissioner, September 16, 1971, transmitting Criteria for Irrigation Soil Classes.[6/]

[6/] Op cit., Commissioner, September 16, 1971.

The irrigable soils classification criteria I developed from the foregoing widely used criteria were adapted to address the specific conditions of soil types, terrain, and subsurface drainage present in the glaciated northern plains of Montana and specifically on the Blackfeet Indian Reservation. In July, 1975, I transmitted a draft copy of my irrigable soils classification criteria to the United States Department of Agriculture, Soil Conservation Service; the United States Department of Interior, Bureau of Reclamation; and the Montana Department of Natural Resources and Conservation, Land Classification Section and solicited review comments from soil scientists and land classifiers in each of the agencies actively engaged in irrigable land classification in Montana.

I received a number of very specific, technical review comments from each of the above agencies. The review comments from the individual agencies were consistent in content and were incorporated entirely into a final revised version of the irrigable soils classification criteria for the Blackfeet Indian Reservation. The final irrigable soils classification criteria were transmitted to the Billings Area Office on February 9, 1976 for final review and approval. Subsequently, the Billings Area Office provided Morrison-Maierle, Inc. with contracts to apply the irrigable soils criteria in determining the acreages of irrigable land on the Blackfeet, Rocky Boys, Fort Belknap, and Fort Peck Indian Reservations. The final report was titled "Water Resource Investigations, Present and Future Water Requirements, Phase II, Addendum I, Irrigable Soils Classification, Blackfeet Indian Reservation, Montana, June, 1979", referred to herein as the Morrison-Maierle, Inc. Irrigable Soils Report.

You will note that the irrigable soils classification criteria (shown on pages 6 through 9 of the Morrison-Maierle, Inc. Irrigable Soils Report are technically and scientifically compatible with all State and Federal criteria presently in use and they are adapted specifically to conditions of the lands where they are applied. Moreover, the criteria and methods used in completing the work presented in the Morrison-Maierle, Inc. Irrigable Soils Report in conform strictly to the policies and requirements for determining irrigable land classes and acreage as provided to us by the

Billings Area Office during the fulfillment of our contract. Of particular importance is the fact that the irrigable soils criteria used for our classification of the lands of the Blackfeet Indian Reservation deal solely with soil and terrain properties without regard to non-soil factors as was specifically directed by the Billings Area Office. In addition, the irrigable soils classification criteria used by Morrison-Maierle, Inc. on the Blackfeet Indian Reservation specifically address the requirements of subsurface drainage of irrigable lands. As discussed on pages 2 through 5 of the Morrison-Maierle, Inc. Irrigable Soils Report the subsurface drainage conditions on the lands clasified as irrigable were determined in detail by field inspection of the well known relationships between subsurface drainage and the geologic substrata of the soils on the Blackfeet Indian Reservation and other parts of the glaciated northern plains of Montana where I have worked extensively as a geologist and soil scientist.

In short, the irrigable soils classification criteria and attendent determination of irrigable land acreage on the Blackfeet Indian Reservation as prepared under my supervision by Morrison-Maierle, Inc. satisfy all of the technical and scientific and standards in prevailing use for determining the suitability of land for sustained irrigation management. The adequacy and propriety of the criteria used to determine irrigable land acreages on the Blackfeet Indian Reservation is further demonstrated by the fact that other consultants preparing irrigability criteria for use by the Bureau of Indian Affairs during the same period of time,".... Apparently (and admittedly)...took a considerable amount of their criteria from the Morrison and Maierle [sic] charts."[7/] The criteria were applied to the detailed and official soil surveys of the Soil Conservation Service in making the irrigability determinations all in compliance with the instructions to us from the Bureau of Indian Affairs.

The Bureau of Indian Affairs, when presented with the specter of actual litigation of the Blackfeet Tribe's claim to water rights, instead of the

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[7/] Bureau of Indian Affairs, Workshop Reivew Comments Concerning Criteria for Classification of Irrigable Soils, BIA Soil Scientists Workshop, Albuquerque, New Mexico, August 23-24, 1976, p. 6.

process of negotiation and settlement they have advocated repeatedly to the Tribe, is thereby faced squarely with the conflict of interest between Trust responsibility to the Blackfeet Tribe and the present use, and plans to use in the future on downstream Bureau of Reclamation projects, the same water flowing from the Blackfeet Indian Reservation. In the face of the intolerable conflict between Federal trust responsiblities and Federal project interests, the Bureau of Indian Affairs has elected to conduct restrictive quantifications of Indian requirements for irrigation water by means of deceptive investigations designed to limit the acreages of irrigable lands identified on the reservations in order to avoid the primary issue of the conflict of interest.

In order to provide justification for implementing the unnecessary duplicative, and deceptive investigations, the Bureau of Indian Affairs has predicated its actions on two strategies: (1) attacking the investigations by Morrison-Maierle, Inc. as reconnaissance in nature, inadequate in detail, philosophical, and theoretical; and (2) representing that the Bureau of Indian Affairs must "qualify a witness" because Morrison-Maierle, Inc. "refuses" to release their data to the Bureau of Indian Affairs. Both of these actions by the Bureau of Indian Affairs further demonstrate the intensity of their commitment to force upon the Blackfeet Indian Tribe an unwanted, inaccurate, and rejected quantification of irrigable lands adverse to the Tribe's claim to water rights, based on speculation about the "feasibility" of arcane concepts applied to projects which do not exist and cannot be defined in any realistic sense under the prevailing circumstances.

As described in detail to this Committee, the irrigable land classifications and quantifications made by Morrison-Maierle, Inc. on the Blackfeet Indian Reservation are undeniably adequate for litigation of the Tribe's claims to water rights. The position the Bureau of Indian Affairs adopts in saying they have not seen our data is ridiculous. The Billings Area Office was fully conversant with and approved of every step of our investigations from development of the irrigability criteria to the type of soils information used. There is nothing mysterious, unknown, or unusual about our investigation, as the Billings Area Office well knows, having approved every aspect of its accomplishment during the progress of the work.

Morrison-Maierle, Inc. has never refused to turn any of our supporting data over to the Bureau of Indian Affairs. The position Morrison-Maierle, Inc. has stated repeatedly to the Bureau of Indian Affairs, on the basis of legal advice from our corporate lawyers, is that so long as the Blackfeet Indian Tribe, as beneficiaries of the investigations we conducted, threatens us with litigation if we release our computations and notes to anyone, we will not release the data without a hold harmless agreement from the Bureau of Indian Affairs or the Tribe. In the meantime, at the specific request of the Billings Area Director, we allowed a representative of the Billings Area Office and a potential consultant to the Billings Area Office to come to our office in Helena and examine all of our notes and computations with the exception of one misplaced field notebook that contained 12 pages of data regarding the Blackfeet Indian Reservation soils. All of the data pertaining to our work was examined by the Bureau of Indian Affairs representative and the representative of the consulting firm they were considering hiring under the January 30, 1983 contract.

The contentions of the Bureau of Indian Affairs regarding the inadequate detail of our investigation and our so called "refusal" to release our data are simply another subterfuge used by the Bureau of Indian Affairs to force upon the Blackfeet Indian Tribe an unwanted, rejected, and undeniably damaging representation of the requirements for irrigation water on the Blackfeet Indian Reservation. As an employee of a firm caught between the demands of the Blackfeet Tribe for fair and honest representation of their interests and the pressures being exerted by the Bureau of Indian Affairs and the United States Department of Justice to force upon the Blackfeet Tribe unwanted and adverse representation, I petition this Committee to utilize its judgement to insure that the Blackfeet Tribe receive honest representation and that other firms are not similarly caught in these disturbing circumstances.

Michael B. Kaczmarek

Michael B. Kaczmarek

ADDITIONAL BACKGROUND INFORMATION

The firm of Morrison-Maierle, Inc. has been in existance since September, 1945. Our present staff consists of about sixty people at this time, considerably below our usual staff of about one hundred people under normal economic conditions.

The personnel of Morrison-Maierle, Inc. consist of Civil Engineers, Agricultural Engineers, Soils Scientists, Geologists, Structural Engineers, Hydrologists and Environmental Engineers supported by technicians and clerical personnel.

Our firm has worked under contracts with several U.S. Government Agencies, such as the Corps of Engineers, Bureau of Reclamation, National Park Service, Department of the Navy, U.S. Air Force and the Bureau of Indian Affairs to name a few.

Our first contract with the Billings Area Office of the Bureau of Indian Affairs for work on the Blackfeet Indian Reservation in northern Montana was dated June 21, 1968. That contract was to perform hydrology studies on the Blackfeet Irrigation Project.

On May 21, 1971 we were again retained by the Billings Area Office of the Bureau of Indian Affairs for an extensive Water Resource Investigation on the Blackfeet Indian Reservation.

Contract No. C50-1420-4800 dated May 21, 1971 was assigned to this project.

The soils investigation and land classification for irrigability performed under this contract was successfully completed on June 30, 1979 as one of nine successive modifications, each increasing the scope of the original contract.

The criteria used in making the irrigable land classification of the Blackfeet Indian Reservation had been accepted by the Area General Engineer as early as February 5, 1975 and had been subjected to review by the Area Soil Scientist and other Bureau of Indian Affairs Soil Scientists at a workshop held in Albuquerque, New Mexico on August 23 and 24, 1976.

The Bureau of Indian Affairs, prodded by the Department of Justice, had announced an advertisement which was published in the Commerce Business Daily of June 9, 1981 asking for proposals to perform soils investigations on Montana reservations including the Blackfeet Reservation, despite the objections from the Blackfeet Tribal Council.

Blackfeet Resolution No. 56-83 dated November 3, 1982 accepted the soils survey and land classification made by Morrison-Maierle, Inc. The Blackfeet Tribe also summarized their understanding that the purpose of the additional investigations was an attempt by the Bureau of Indian Affairs to reduce the quantity of water to which the Blackfeet Tribe is entitled.

The Bureau of Indian Affairs re-advertised the preparation of soil surveys on the Blackfeet Reservation in August, 1982 and a contract was signed with CH2M-Hill, an Oregon Consulting Engineering firm, to provide the services.

Morrison-Maierle, Inc. believes that the large expenditure proposed by the Department of Justice and the Bureau of Indian Affairs is intended to dilute the credibility of the Morrison-Maierle work simply by the expenditure of a large sum of money.

We have been informed on several occasions, and it is our belief, that the primary purpose of the duplicate soils investigation is to reduce the irrigable acreage claim on the Blackfeet Reservation. It is the irrigable acres that constitutes the primary basis for the Blackfeet water right claim which appears to be in conflict with the Department of Justice and the Bureau of Indian Affairs.

Over the objection of the Blackfeet Tribe, the United States made a filing with the State of Montana in the ajudication proceeding that the State has attempted to initiate through the passage of "Senate Bill 76".

The Blackfeet Tribe objected to that filing on the basis of the Ninth Circuit Court Opinion to the effect that the State does not have jurisdiction (Northern Cheyenne Case). That case is now being reviewed by the U.S. Supreme Court. The Department of Justice elected to proceed with its filing rather than await a possible change of the Circuit Court ruling by the Supreme Court.

In the claim filed by the United States, no claim was made for the Blackfeet Tribe for waters from the Milk and Saint Mary's rivers. Our soils investigations would necessarily provide for claims from those streams.

In spite of the fact that the President's Indian Policy Statement emphasizes this Administration's commitment to encourage and strengthen Tribal Government as called for by President Nixon in 1970 and by Congress in the Indian Self Determination Act of 1975, the Bureau of Indian Affairs and the Department of Justice continue to interfere in Tribal affairs. Excessive regulation and self perpetuating bureaucracy have stifled Tribal decision making, thwarted the Indian control of reservation resources, and promoted dependency rather than self determination and sufficiency.

The Indian Policy Statement further states that this administration will reverse this trend by removing obstacles to self government and by crediting more favorable environment for development of a healthy reservation economy. This policy recognizes the versatility of the Tribes and the right of each to set its own priorities and goals and to proceed at its own pace. At the same time, the Federal Government will continue to fulfill its traditional responsibility for the physical and financial resources held in trust for the tribes and their members. Indian tribes are Tribal Government because they retain all aspects of their original sovereignty not otherwise given up or taken away by Congress.

1. The Administration must deal with Indian Tribes on a "Government to Government" basis.

2. Tribal Government will be strengthened through the action of encouragement for tribes to assume responsibility for services such as the enforcement of Tribal Laws, developing and managing Tribal Resources, providing health and social services, and education.

The Blackfeet Tribe is able and willing to determine its own destiny and carry-out its own development objectives concerning land and water resources.

The extensive Morrison-Maierle, Inc. Water Resources Investigation on the Blackfeet Reservation covered a period of over eight years of meticulous professional studies and investigations addressing numerous aspects of soil science and other conditions to determine the irrigability of the soils on the reservation, at a cost of over $180,000.00.

The intent of our contract was for the Contractor and Contracting Officer to work together in preparing a complete water resource report, with the Contracting Officer supplying as much information as had already been compiled, and the Contractor providing the remainder of the information required and consolidating the whole into a finished report.

We feel that any other studies undertaken as proposed by the Bureau of Indian Affairs is a duplication of work done by other Government Agencies and Morrison-Maierle, Inc., and is a waste of funds which could be better spent in the development of irrigation projects which would be a direct benefit to the welfare of the Tribe.

Thank you for making this time available to me before your Committee.

Joe Maierle

Joe A. Maierle
Chairman, Board of Directors

Senator MELCHER. Has Morrison-Maierle submitted vouchers for all the work you did in the 1970's on this soil study for the Blackfeet Reservation?

Mr. MAIERLE. Yes.

Senator MELCHER. How much did they total?

Mr. MAIERLE. We have been paid for our work. The total amounted to about $180,000.

Senator MELCHER. Was that completed in 1979?

Mr. MAIERLE. Right.

Senator MELCHER. Was there any suggestion to you by the Department of Interior that those studies were inadequate?

Mr. MAIERLE. Not at all.

Senator MELCHER. And so, for $180,000 you completed work which they thought was adequate in 1979.

Mr. MAIERLE. That is correct.

Senator MELCHER. Has anything changed since 1979 on the Blackfeet Reservation regarding these soils?

Mr. MAIERLE. Not to my knowledge.

Senator MELCHER. How long have you been at this in Montana?

Mr. MAIERLE. At this work?

Senator MELCHER. Yes.

Mr. MAIERLE. Thirty-five years.

Senator MELCHER. Mr. Kaczmarek, I do not believe you have been at it that long, have you?

Mr. KACZMAREK. No. Nine years.

Senator MELCHER. Did you participate in this soil survey? I determined that you have, judging from your testimony here.

Mr. KACZMAREK. Yes, I did. I was the principal investigator in charge of the investigation.

Senator MELCHER. Was anything ever raised to you by the Department of Interior that you had not completed what they requested?

Mr KACZMAREK. No.

Senator MELCHER. Was there any indication that they wanted more?

Mr. KACZMAREK. During the course of the study?

Senator MELCHER. Up until, and including, 1979.

Mr KACZMAREK. Not at all. We worked exactly under the guidelines that were provided to us.

Senator MELCHER. At what time in 1981 or 1982 were you consulted that perhaps there was not sufficient information?

Mr. KACZMAREK. I think the first time that I personally became aware of it was when I heard about the advertisement for a new contract.

Senator MELCHER. When was that?

Mr. KACZMAREK. That was in the fall of 1981. I do not recall the exact date, but it was in September or October.

Senator MELCHER. Within 2 years after you completed your soils survey in 1979 then?

Mr. KACZMAREK. That is correct.

Senator MELCHER. And that request for an RFP was withdrawn, was it not?

Mr. KACZMAREK. As I understand it, it was at least temporarily withdrawn. As we know now, it was later readvertised and awarded.

Senator MELCHER. In 1982?

Mr. **Kaczmarek.** That is correct.

Senator **Melcher.** Then, did you ask, or did either one of you ask the Department of the Interior what more they wanted?

Mr. **Kaczmerak.** Well, it was pretty clear in the solicitation, because the solicitation, or the RFP, included a statement of work with all of the technical specifications for the work that was to be done under that particular contract.

Senator **Melcher.** Was it clear that it duplicated work already done?

Mr. **Kaczmerak.** Absolutely.

Senator **Melcher.** Most of the work?

Mr. **Kaczmerak.** I would say all of the work.

Senator **Melcher.** All of the work?

Mr. **Kaczmerak.** It is a duplication of the exact type of thing that we did.

Senator **Melcher.** For $180,000?

Mr. **Kaczmerak.** That is correct.

Senator **Melcher.** Is it proper to call this a request for a bid, or a request for information?

Mr. **Kaczmerak.** Well, it is called a request for a proposal and what that means is that the Government requests consultants to submit proposals, including technical specifications for their work and cost proposals to the Government. Those are evaluated by the procurement branch of the Government agency, which then, on the basis of technical and cost criteria, select one or more firms which they then negotiate a final contract with.

Senator **Melcher.** Sort of a one-on-one basis?

Mr. **Kaczmerak.** That is the way it ends up; yes sir.

Senator **Melcher.** Did Morrison-Maierle provide access to all of the data that you assimilated under these 1970 soil studies which cost $180,000?

Mr. **Kaczmerak.** Yes sir, we did. We had a slight problem there because the Blackfeet Tribe contacted us and requested that we not release any of our computations or notes. However, we were contacted directly by the Billings area director with a request that if we could not send the stuff to him, at least, could they send a guy over to look at it.

The Tribe was involved in that decision and said, yes, that would be all right as long as we did not give the information to them to take back with them. So they sent over a representative of the Billings area office, as well as a representative of another consulting firm that was considering submitting a proposal on this new contract. And they examined all of that information in our office with the exception of one field notebook, which was misplaced at the time and had some soils logs of about 12 bore holes in it. So, yes, they were provided access to all of the information that we had. They did come to our office in Helena and examined that information.

Senator **Melcher.** Who did?

Mr. **Kaczmerak.** It was a representative of the BIA. Clark Madison was the young man's name. And I do not recall the representative, the name of the fellow from the consulting firm.

Senator **Melcher.** What consulting firm was it?

Mr. **Kaczmerak.** It was HKM, which is Hurlbut, McCullough and Kersich. Do not ask me to spell that because I cannot.

Senator **Melcher**. Did they get the information?

Mr. **Kaczmerak**. They were not successful. I do not know, in fact, if they ever did submit a proposal. I have no idea.

Senator **Melcher**. Did CH2M Hill, Incorporated send anyone around?

Mr. **Kaczmerak**. No, they did not.

Senator **Melcher**. Was the information available to them?

Mr. **Kaczmerak**. We never received a request for it. I am sure that similar arrangements could have been made.

Senator **Melcher**. Were any time constraints placed on them in reviewing the data?

Mr. **Kaczmerak**. In regards to how long they could stay and examine it?

Senator **Melcher**. Yes.

Mr. **Kaczmerak**. No sir, none. The only constraints were that they could not take the original information or make copies of it.

Senator **Melcher**. So for $180,000 you completed what was called for in this new solicitation?

Mr. **Kaczmerak**. Yes, that is correct.

Senator **Melcher**. Do you think it would be worth $1.2 million to repeat it?

Mr. **Kaczmerak**. Well, I personally could spend a lot of time and money duplicating effort.

Senator **Melcher**. Would you have prepared such a proposal for $1.2 million?

Mr. **Kaczmerak**. No. As a matter of fact, when we became aware of it, we indicated to the BIA that we felt it was duplication of our work and we could not understand why they were doing that.

Senator **Melcher**. Thank you both.

Mr. **Maierle**. Thank you.

Senator **Melcher**. The next witness is Jack Twitchell, CH2M Hill, Inc., from Corvallis, Oreg.

STATEMENT OF JACK TWITCHELL, CH2M HILL, INC., CORVALLIS, OREG.

Mr. **Twitchell**. Mr. Chairman, members of the committee, my name is Jack Twitchell. I am with CH2M Hill.

Senator **Melcher**. Do you have prepared testimony, Mr. Twitchell?

Mr. **Twitchell**. No, I have not. I did not know that I was to be a witness until about 5 minutes ago, but I would like to make some comments. I have written some down if that is all right.

Senator **Melcher**. Was CH2M Hill notified?

Mr. **Twitchell**. Yes sir, it was notified only about the hearing.

Senator **Melcher**. Where is your witness then?

Mr. **Twitchell**. Well, I will be a witness today. They asked me to come here, but they did not specify that I was to be a witness. They thought it was just to listen to the hearings. I will certainly be happy to make a statement.

Senator **Melcher**. All right. Please proceed.

Mr. **Twitchell**. I would certainly like to address the technical aspects and not the political portion of this.

Senator MELCHER. Mr. Twitchell, who was the representative of CH2M Hill who called a committee staff person yesterday and said that you would be the witness? Did you call?

Mr. TWITCHELL. No. sir.

Senator MELCHER. Who did then?

Mr. TWITCHELL. I did not hear all of that question.

Senator MELCHER. Who was the person from CH2M Hill who called the committee yesterday and said that you would be the witness?

Mr. TWITCHELL. I am not sure, sir, I have not spoken to anyone from my office.

Senator MELCHER. Are you alone here today from CH2M Hill?

Mr. TWITCHELL. As far as I know.

Senator MELCHER. Fine. Please proceed.

Mr. TWITCHELL. I should state that the Morrison-Maierle report was based on the SCS survey and the soil survey was previously done by the Soil Conservation Service, U.S. Department of Agriculture. The report was based on field work done by the SCS.

Senator MELCHER. Pardon me?

Mr. TWITCHELL. According to their report, Morrison-Maierle did not do much of the field work for the soils investigation. That was based on work done by the Soil Conservation Service. I wanted to clarify that. The Morrison-Maierle work did not include mapping the soils and so forth. It did include some review of existing soils information done by SCS.

Senator MELCHER. Was there something wrong with the Soil Conservation Service?

Mr. TWITCHELL. Certainly not. I am just pointing that out.

Senator MELCHER. Did you use it as a reference?

Mr. TWITCHELL. Yes.

Senator MELCHER. Did you use it as a reference for your proposal? I judge you have not done much of this work yet.

Mr. TWITCHELL. We have not done much of the work yet. That is correct, sir.

Senator MELCHER. In your proposal did you use it as a reference?

Mr. TWITCHELL. Yes, I am sure we did. We will make valuable use of it.

Senator MELCHER. The soil conservation work?

Mr. TWITCHELL. That is correct.

Senator MELCHER. OK.

Mr. TWITCHELL. The SCS soil survey is not, however, a specific irrigation type survey as requested by the BIA. The SCS soil survey groups are classified soils by observable field characteristics found during the examination of the soil profile. It is important to understand that the information found in the description of the soil series, which is what the SCS soil survey is based on, is broadly defined so that it may be used in a general way for many different purposes and often in widely separated areas.

It is not designed to provide specific information for project irrigation purposes. On the other hand, the type of survey that we have proposed, the U.S. Bureau of Reclamation survey, is an irrigation suitability land classification proposed to define the irrigation potential of the Blackfeet Indian Reservation. And this is specifically designed for this purpose.

Compared to the more general information provided in the SCS soil survey, the U.S. Bureau of Reclamation survey, irrigation land class survey for the reservation lands, will be highly specific. The pertinent factors of soil, topography, drainage, climate and water quality of the reservation lands will be correlated with economic factors to group the lands according to their suitability for sustained irrigation.

According to the Morrison-Maierle report, the soil properties were observed by 5-foot hand auger borings with a few borings to 8 or 10 feet. No record of the location of the borings, profile log, sampling or laboratory test results was given.

A necessary and very important part of the irrigation suitability land classification that we propose doing will be the drainage investigation study. Deep borings, samples, permeability of the soil layers will all be made to the depth of any barrier layer. This information is lacking as far as I can find, in the Morrison-Maierle report. Thank you.

Senator MELCHER. Could you tell us, Mr. Twitchell, a little bit about CH2M Hill? What is your position with the firm?

Mr. TWITCHELL. I am a soil scientist with the firm.

Senator MELCHER. Soil scientist.

Mr. TWITCHELL. My office is in Redding, Calif.

Senator MELCHER. Have you reviewed the previous study?

Mr. TWITCHELL. Excuse me, sir. I am hard of hearing.

Senator MELCHER. Oh. Pardon me.

Have you reviewed the Morrison-Maierle study?

Mr. TWITCHELL. I received a copy of the Morrison-Maierle report from the BIA along with some soil maps. There was, however, no information on the samples, laboratory testing, the location of the samples taken, if any, and so forth.

I did also talk to the Soil Conservation Service, the people that made the initial survey, the people that worked in the field and they told me what samples they had taken, which were very limited, the general SCS survey type.

Senator MELCHER. Well, we are getting conflicting testimony now. I will just ask you to elaborate so we can better understand it.

The witnesses just preceding you, Morrison-Maierle, said that the request for proposal duplicated work that they had done. You interpret that request for proposal differently than they did?

Mr. TWITCHELL. Yes; the SCS survey, which was in the Morrison-Maierle report, was available but this is not an irrigation type of land classification. It provides useful information but it, for one thing, is not specific to irrigation. It does not take enough samples, for example. It is based on the series definition and the phase definition, which is a profile description of a generalized soil. It is not specific, necessarily, to irrigation.

Senator MELCHER. That is the point of conflict between the two witnesses. Morrison-Maierle intepreted that request for proposal to duplicate what they had already done. You do not see that?

Mr. TWITCHELL. No, that is correct sir. This is not a duplication of that work. This is in addition to that work, making use of some of that information. Correct. But it will be specifically toward irrigation suitability.

Senator MELCHER. But you never saw any need to review, directly with Morrison-Maierle, work that they had done?

Mr. TWITCHELL. We discussed, with the BIA, all of the information that was available and they sent us information. I was not aware of any information in addition to the Morrison-Maierle report and the soil maps, which were taken from the SCS information.

Senator MELCHER. Are you telling me and this committee, that the request for proposal did not describe what had been done in the 1970's by Morrison-Maierle?

Mr. TWITCHELL. It may have. I do not have that information. I am just saying I had a copy of their report.

Senator MELCHER. You had a copy of a report submitted to you by the Department of Interior through the Bureau of Indian Affairs?

Mr. TWITCHELL. We picked it up in Billings, Mont., one of our soil scientists. That is correct, sir.

Senator MELCHER. And you are not informed? Were you informed that the Blackfeet Tribe's position was that this study had been completed?

Mr. TWITCHELL. I was not in on the politics of the things. No; we submitted a proposal in response to the BIA's request.

Senator MELCHER. In preparing that proposal, has CH2M Hill consulted with the Blackfeet Tribe?

Mr. TWITCHELL. We spoke to the BIA. I did not get involved in that part of it. I was providing technical input as far as what was needed in a soil survey in an irrigation suitability land classification.

Senator MELCHER. Well, who in CH2M Hill gets into that part? It seems to me that that is rather pertinent.

Mr. TWITCHELL. It may well be to you, sir. I can certainly find out for you and give you that information.

Senator MELCHER. You do not know?

Mr. TWITCHELL. Well, I believe Mr. Mickelson of our Boise office is the administrator on this project.

Senator MELCHER. You think maybe he did?

Mr. TWITCHELL. He is the administrator. He certainly should be able to, yes, sir.

Senator MELCHER. You are not informed that the tribe contended that the work had already been done?

Mr. TWITCHELL. No, sir, I was not.

Senator MELCHER. Were you informed that the tribe, contending the work had already been completed, passed a tribal council resolution to prohibit access on to the reservation?

Mr. TWITCHELL. I was not involved in that portion of the proposal. I was involved in making a decision as to what should go into a land classification study and putting cost figures on that.

Senator MELCHER. Well, would you participate in the work, the actual on-the-ground work?

Mr. TWITCHELL. Certainly, I would.

Senator MELCHER. But you were not informed that the tribe, contending that the work had already been done, passed a resolution that would not allow access onto the reservation?

Mr. TWITCHELL. I do not recall hearing about the work already being done. I knew that there was a report, a soils report, like I mentioned, the Morrison-Maierle report.

Senator **Melcher.** Could you do the work without getting on the reservation?

Mr. **Twitchell.** No, sir.

Senator **Melcher.** What work has been done by CH2M Hill that amounts to $30,000?

Mr. **Twitchell.** Oh, there has been a review of a number of documents, including the Morrison-Maierle report.

Senator **Melcher.** Do you have the voucher with you?

Mr. **Twitchell.** No, sir.

Senator **Melcher.** Have you seen the voucher?

Mr. **Twitchell.** I saw a voucher in the file report in my office, yes, in Redding, Calif.

Senator **Melcher.** It says that there was labor for $21,635. What was that labor?

Mr. **Twitchell.** Well, I am not the project manager on it. I can tell you what my labor was.

I have about 2 or 2½ weeks of labor on the project, reviewing documents, making arrangements for other soil scientists to go in the field, ordering potential equipment to be used in the field, this kind of thing.

Senator **Melcher.** Does that involve getting on the actual land?

Mr. **Twitchell.** That is something that always has to be done. We have nine soil scientists to equip and be prepared to go in the field.

Senator **Melcher.** Onto the reservation?

Mr. **Twitchell.** Yes, sir, as soon we are given the word.

Senator **Melcher.** Will you go there if it is in violation of a trespass?

Mr. **Twitchell.** Certainly not. We will not break the law.

Senator **Melcher.** You know, it is hard for me to understand the layers of your company that you have to prepare all of this stuff. I think you have spent, you said, 2 weeks or more of your own time as a soil scientist, when, so far, there is no indication that you can get on the property to test the soil.

Mr. **Twitchell.** It is just like engineering, sir. There is a lot of work to be done prior to construction.

Senator **Melcher.** On the faith that, at some point, you are going to get on the land.

Maybe you can shed a little bit of light on this, Mr. Twitchell. I do not know, maybe it is beyond your knowledge, but if you have knowledge on it please advise us. One of the points that concerns the committee is, who is employed by CH2M Hill and is now working for the Department of the Interior? Have you employed people who have worked for the Department of the Interior?

Mr. **Twitchell.** I used to work for the Bureau of Reclamation in Montana in 1953 or 1954. I was the head of the soils laboratory, land classifying section, Miles City, Mont. Is that what you are referring to? That was a long time ago, sir.

Senator **Melcher.** Yes, that is a broad question. How about working for the BIA in the last 5 years?

Mr. **Twitchell.** I know, of my personal knowledge on this project, we have not hired anyone from the BIA. There may be someone in the company, certainly working, that has worked for the BIA. There are people that have worked in many branches of Government, many offices.

Senator **Melcher**. Well, I think I should narrow my question just to the BIA.

Mr. **Twitchell**. I personally know of no one.

Senator **Melcher**. All right.

Mr. **Twitchell**. But there are more than 1,000 engineers in our company. There certainly could be some who have previously worked for the BIA.

Senator **Melcher**. There certainly could be some.

Mr. **Twitchell**. That is right.

Senator **Melcher**. Do you know of any former employee of CH2M Hill who are now working for the BIA?

Mr. **Twitchell**. Former employees of the BIA?

Senator **Melcher**. No, the opposite.

Mr. **Twitchell**. Former employees of CH2M now working for BIA?

Senator **Melcher**. Right.

Mr. **Twitchell**. No, I do not. But, again, there might be some. I have no personal knowledge of that.

Senator **Melcher**. Well, we are not asking you to go any further than your personal knowledge.

Did you ever work on the Klamath fisheries study?

Mr. **Twitchell**. No, sir, I have not.

Senator **Melcher**. Did CH2M Hill have a contract on that to do the Klamath fisheries study?

Mr. **Twitchell**. I understand they have a contract on that.

Senator **Melcher**. Does the name, David Harrison, mean anything to you?

Mr. **Twitchell**. Was that name Harrison?

Senator **Melcher**. David Harrison.

Mr. **Twitchell**. No, sir.

Senator **Melcher**. Doyce Waldrip?

Mr. **Twitchell**. No, sir.

Senator **Melcher**. All right. Thank you very much, Mr. Twitchell.

[Subsequent to the hearing the following material was received for the record.]

CH2M
HILL
engineers
planners
economists
scientists

STATEMENT OF CH2M HILL
BEFORE THE
SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
WASHINGTON, D.C.

Chairman Andrews, my name is Jack Twitchell. I am employed by CH2M HILL, Inc., as a soil scientist and operate from the firm's Redding, California, office. Since 1959, I have been associated with CH2M HILL as Department Manager of Agricultural Sciences and as Senior Soil Scientist. My professional affiliations include National Certification as a Professional Soil Scientist, registration in California as a Professional Engineer, and Past President of the Professional Soil Scientists Association of California.

My experiences that are directly concerned with the satisfactory completion of this contract include:

- As Department Manager, I was responsible for land classification studies to determine the irrigation suitability and water requirements (BuRec standards) for a number of Small Reclamation Projects Act Loan Applications. Our firm has been responsible for the planning and design of about 20 of these projects throughout the West, covering several hundred thousand acres.

- Prior to my work with CH2M HILL, I was in charge of the Soils Classifying Laboratory for the Bureau of Reclamation at Miles City, Montana.

CH2M HILL is the seventh largest consulting engineering firm in the Unites States. Our staff of approximately 2,000 employees in over 35 offices world-wide has since 1946 been providing clients -- governments at all levels and the private sector -- with comprehensive services in engineering, planning, economics and the environmental sciences.

This formal statement supplements the impromptu remarks that I made before the hearing on the Blackfeet Reservation study conducted by Senator John Melcher on April 12, 1983. Before I add these additional comments and observations, I wish to clarify why CH2M HILL did not present formal written testimony at that time.

Redding Office
1525 Court Street, P.O. Box 2088, Redding, California 96099 916/243-5831

CH2M HILL received the letter from the Committee dated March 16, 1983. This letter did not specifically request our presence nor ask us to testify, but appeared to us to be a routine courtesy notice of the hearing. We decided that, at our expense, I would go to Washington, D.C., to have someone present as an observer.

Our Washington, D.C., office called Senator Melcher's staff to determine the time of the hearing and to confirm our intent to be present. Misunderstanding on our part led Senator Melcher's staff to believe that I would appear as a witness rather than as an observer.

Further reinforcing the conclusion that I would appear as an observer is the fact that we, as consulting engineers under contract, are rarely called upon to testify on policy questions since we work for the client. While we certainly have nothing to hide about our professional expertise, qualifications, and selection, questions about the Bureau of Indian Affairs' rationale for contracting for this study, I am sure you would agree, should be directed to that Agency and not us.

On behalf of CH2M HILL and myself, I hope that this clarifies the misunderstanding which caused us to appear at the hearing unprepared. We trust, however, that the information provided by the Department of Justice, the Bureau of Indian Affairs, and ourselves will put this matter to rest. We look forward to serving the real needs of the Blackfeet Nation and our client by completing this important study.

Attached is my edited transcript for the Hearing Record. Since there was some question about the adequacy of the Morrison-Maierle Report, I am attaching an "unofficial" review of it obtained recently by one of CH2M Hill's employees from the Bureau of Reclamation's Denver Engineering and Research Center.

RDR6/006

United States Department of the Interior
BUREAU OF RECLAMATION
ENGINEERING AND RESEARCH CENTER
P O BOX 25007
BUILDING 67, DENVER FEDERAL CENTER
DENVER, COLORADO 80225

IN REPLY REFER TO D-700

APR 21 1983

Mr. Mike Stansbury
CH2M Hill
5995 So. Syracuse
Denver, CO 80237

Dear Mr. Stansbury:

In response to your request of April 21, 1983, we are forwarding to you a copy of our memorandum of March 23, 1983 to the Bureau of Reclamation Regional Director in Billings, Montana, regarding our evaluation of a land classification study of the Blackfeet Indian Reservation, Montana.

This memorandum represented our evaluation of the Morrison-Maierle, Inc., report only, and did not include any investigation of supporting material that did not appear in the report.

Sincerely yours,

Robert K. Lanky

Robert K. Lanky, Chief
Division of Planning
Technical Services

Enclosure

RPiper:ofs 3/23/83

MAR 23 3 46 PM '83

D-700 D-740
D-715
D-720

FAXOGRAM
TRANSMITTED

E&R Center, Denver
D-715

To: Regional Director, LBR, Billings, Montana
Attention: UM-760

From: Chief, Division of Planning Technical, LBR, E&R Center, Denver, Colorado

Subject: Evaluation of Land Classification Study, Blackfeet Indian Reservation, Montana

As discussed with Tom Casey of your staff, we are forwarding an evaluation of the lands study performed by Morrison-Maierle, Inc., under contract with the Bureau of Indian Affairs on the Blackfeet Reservation in Montana. This evaluation represents our views relative to its adequacy as an irrigation suitability land classification in the sense that we perform those studies within this agency.

I understand that this evaluation is also of interest to the Bureau of Indian Affairs office in Billings, and it may be made available to them with the understanding that it should not constitute an official review by this agency of the performance of their contractor.

ROBERT K. LANKY

Enclosure (by faxogram)

Evaluation of Irrigable Soils Classification Study
Morrison-Maierle, Inc.
Blackfeet Indian Reservation, Montana

We have reviewed this document, fully entitled Water Resource Investigations, Present and Future Water Requirements, Phase II, Addendum I, Irrigable Soils Classification, and offer the following comments on it.

This report contains no supporting data, but is merely a report of the conceptual basis, or philogophy, of the classification used and a tabulation of acreages assigned to each class for the reservation as a whole.

This study has obviously relied heavily on the use of soil survey data as a basis for delineation of suitability classes, a procedure which can be useful in theory (particularly on less detailed studies), but which is prone to difficulties inpractical application. This occurs as a result of the nature of surveys which are made for the purpose of delineating mapping units on the basis of soil genesis and morphology rather than land suitability for a specific use (in this case, irrigation). This difficulty is illustrated by the discussion of Martinsdale soils given in the first paragraph on page 5. Additionally, land classification studies made by Reclamation are predictive (based on conditions which will exist under a sustained irrigation regime of a type anticipated for the area) rather than based on criteria established under present use conditions, and they are financial and economic in terms of measurement of net farm income levels under irrigation as well as in terms of measurement of irrigation benefits for determination of project feasibility. The subject study does not, at least from what can be seen in this report, meet those requirements.

Another difference or omission in concept related to this study concerns the consideration of land in Bureau studies contrasted to consideration of soil as shown in this study. Soil is but one of the factors considered in a land classification. Such items as substratum nature and depth (related to drainage requirement), climate, cropping pattern and irrigation method, costs of production and land development, etc., are all critical in performance of a Bureau land classification. This study does not seem, for instance, to have included sufficient deep borings or field permeability measurements to make any sort of reliable drainage requirement estimate.

Finally, no information is available regarding subclasses or informative appraisals relative to types or degree of deficiencies which caused lands to be placed in lower land classes. Without this information, little can be said about ultimate land performance under irrigation.

Without a review of actual data available or gathered for this study (nothing is said about number of borings examined, laboratory analysis performed, field tests run, etc.) little can really be said of its technical adequacy relative to Bureau of Reclamation procedures. It does appear that, at best, this study would probably be useful in determining irrigation suitability only on a reconnaissance basis, and that considerably more investigation would be needed to determine irrigation suitability on a feasibility (semidetailed) basis which would probably be required to establish or support a water right claim.

Senator MELCHER. The next witness will be Earl Old Person, tribal chairman of the Blackfeet Tribe. Please proceed, Earl.

STATEMENT OF EARL OLD PERSON, TRIBAL CHAIRMAN, BLACKFEET TRIBE, BROWNING, MONT., ACCOMPANIED BY: DAN BOGGS, LAND DEPARTMENT, BLACKFEET TRIBE; BILL VETTER, TRIBAL ATTORNEY, BLACKFEET TRIBE; FRANCIS POTTS, CHAIRMAN OF HONORARY COUNCIL, BLACKFEET TRIBE; WILLIE RUNNING CRANE, MEMBER OF THE HONORARY COUNCIL, BLACKFEET TRIBE; AND JOE BEAR MEDICINE, MEMBER OF THE HONORARY COUNCIL, BLACKFEET TRIBE

Mr. OLD PERSON. Thank you, Mr. Chairman.

I have with me this morning, to my far right, Mr. Dan Boggs, another member of our tribal council and he is the head of our land department. To my immediate right is Mr. Bill Vetter the tribal attorney for the Blackfeet on our water rights. To my far left is Francis Potts, who is chairman of the honorary council. This is made up of the elderly members of the reservation and the tribe. Excuse me, that is Willie Running Crane to my far left. Francis Potts next to Willie Running Crane, who is the chairman of the honorary council and to my immediate left is Joe Bear Medicine, who is also a member of the honorary council, as well as Willie Running Crane.

On behalf of the Blackfeet people, I certainly want to express our appreciation and thanks to the committee for setting up this hearing in order to be able to discuss this very important issue, an issue that we feel is very touching and is something that my people, especially the elderly members of the Blackfeet Nation, are very concerned with. And if I may elaborate a little further, when these old-timers begin to discuss the rights that they continuously say that is their right, and want to maintain and keep, it becomes very crucial to them whenever these rights are being discussed.

The issue that is being discussed today is often referred to by our people, especially the old-timers, as the backbone of our Blackfeet Nation or of any Indian Nation throughout this country. We are not experts when it comes to talking about water studies, talking about soil, land classifications. But the thing that we maintain is that we are the people on the Indian reservations that have to live with these kinds of concerns. Anything that derives, anything that is set regarding the various kinds of rights that we claim on the reservations, if they are ever damaged as to how we might see it, then we are going to be very concerned and we are the people that are going to be affected.

Again, I am saying the kinds of people who cannot help but remain on these kinds of lands, such as the Indian reservations, are mainly our old-timers. I think I may sound repetitious at times in saying that many of us who are able to do, and can do, it will probably not affect us as it would affect those people that recognize it as their home base, a land that they have lived on and a land that they intend to live on in the future. They are not in a position, if the going gets tough, that they can pack up and leave. Maybe the rest of us can do that. But they are people who are going to have to remain on that particular land.

Right at its very beginning I listened to my elders. I used to be an interpreter for the old-timers when I first came into politics, which is about 30 years ago. They often talked about some of the reasons why they are skeptical and often question when someone wants to come on and do something on the reservation, such as what we are talking about today, because of the past experiences that they have had.

One of the things they often bring out when they receive a bill for irrigation charges, maintenance and operation charges for their lands, they say when they wanted to have the canals, the irrigation ditches, we were told that this is going to be for your free use. You can use this for irrigation purposes without charge. They said, but later years we were being charged with the kinds of maintenance and operations that were taking place within our irrigation projects.

This is the reason that they often say we cannot go along with these kinds of talks unless we know what really is in the making and what is the truth.

The Blackfeet Tribal Council was very concerned about this particular study that is being proposed and that has already been awarded. They were in question about it right at its beginning. We, too, felt that a study has already been made. We, too, felt that the study that was made was sufficient. And, again, as I said earlier, we are not those experts to really say, well this is how we know that it is sufficient. But, in commonsense, we felt that there has been a study made and we feel it is sufficient. Why should we enter into another study that is going to cost over $1 million?

Our water resource department has been seeking funds and we, as a tribe, as a whole, have been seeking funds in order to try to develop our water resource program. We have not been successful in this particular move. And to find out that there is going to be a study made with over $1 million to be expended, we feel that that kind of money, even a portion of it, could be let to the tribe itself in order to develop their water resource program on the reservation.

And I believe that after we are given that opportunity to develop the kind of water resource program that we see, and that we feel is needed on the reservation, and then if we see that a study needs to be made, let us request it, let us ask for a study or a restudy, or any additional study that is needed.

If we are wrong in stomping a new study, if we are wrong in not wanting a study at this time, let us suffer accordingly. If we are wrong, we are the ones who are to blame. But, let us make that determination.

I was talking with these old-timers here. They were questioning, what is going on. What is this all about? This was a few months ago. And we were talking about it and they said:

> Well, why don't we know something about it? Why aren't we contacted? Why can't we enter into these things and be able to say this is how we see it. This is what we think that we need for our water resource program.

I cannot agree with the fact that our lands are always referred to as reservations. I have said this before. I think our ancestors, our old-timers, had to be very strong and very brave in order to keep that portion of land that we are on for the future Blackfeet. Otherwise, we would not be here sitting and arguing about water, or whatever. But they had to be to the point that they were determined. And I believe at that time, no one was concerned about our reservation or other reservations for other Indian people.

Again, I am going to stand on my elders, and what they said:

> You are going to fight battles yet, but this time you are not going to fight with bows and arrows, and ammunition. You are going to fight with documents. Someone is going to be looking back and wanting something from you again and it is today.

Our water is the life. Our water is sacred as well as that we are able to use it. And if we lose that water we are losing something that cannot continue our lands. Water is everything. We are not being selfish, but we only want to be given the opportunities that are needed, and then, if we cannot do this, we are going to have to look elsewhere, or for something else, in order to do what is needed to be done as far as the water resource is concerned.

With that opening statement, and with the general statement, we have a report that is submitted for the record. I want to ask my fellow men to elaborate very briefly as to any addition to the issue that we are discussing at this time. I think the main point that I want to bring out, the council has gone on record, by resolution, that they did not agree with this new study and that they are not allowing, according to the resolution, anyone coming upon the reservation.

I think this is a document that can only be changed by the tribal council if it needs to be changed. This is a document that I think we had better be concerned with at this time. With that, Mr. Chairman, I would like to ask our chairman of the land committee, Mr. Dan Boggs, if he would like to elaborate a little further at this time.

Senator MELCHER. Earl, as you were told, that will not be possible at this hearing. We are on limited time and the principal information we are seeking does not rest with the tribe. The principal information we are seeking rests with the Department of the Interior and possibly the Department of Justice.

Any written testimony that any of your tribal representatives or your lawyers, want to submit, will be made part of the record or part of this hearing file at least.

But, we do have to ask you a few questions to make this phase of this hearing complete. Did you write to me in 1981, voicing concern that a duplicate study was being proposed?

Mr. OLD PERSON. Right.

Senator MELCHER. We will make that letter part of the hearing record at this time.[1]

Senator MELCHER. I, in turn, wrote to the Department of the Interior questioning just exactly what they were doing.

Did you write to me again in 1982 saying that you understood that a request for a proposal for such a study was being prepared?

Mr. OLD PERSON. Yes.

Senator MELCHER. We will make that letter from you part of the record at this point, as well as my subsequent correspondence with the Department of the Interior.

[The exchange of correspondence follows:]

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[1] Material not available at time of printing.

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
Washington, D.C., December 7, 1982.

EARL OLD PERSON,
Chairman, Blackfeet Tribal Business Council, The Blackfeet Tribe, Browning, Mont.

DEAR EARL: Regarding our correspondence about the land classification studies, I am enclosing a letter from Sidney Mills of the Bureau of Indian Affairs.

They have promised to explore the issues with you prior to January 20. Let me know how it goes.

Best regards.

Sincerely,

JOHN MELCHER,
Ranking Minority Member.

Enclosure.

U.S. DEPARTMENT OF THE INTERIOR,
BUREAU OF INDIAN AFFAIRS,
Washington, D.C., November 23, 1982.

Hon. JOHN MELCHER,
U.S. Senate, Washington, D.C.

DEAR SENATOR MELCHER: Thank you for your November 1 letter on behalf of Mr. Earl Old Person, Chairman of the Blackfeet Tribal Business Council, regarding further land classification studies on the Blackfeet Indian Reservation.

No contract has been awarded for additional soils studies at Blackfeet. That matter and related issues are under consideration currently here in the Department. We expect a final decision by January 20 which will afford the opportunity to explore these matters in depth with Chairman Old Person prior to that date.

If we can be of further assistance, please let us know.

Sincerely,

SIDNEY L. MILLS,
Director, Office of Trust Responsibilities.

THE BLACKFEET TRIBE,
Browning, Mont., October 12, 1982.

Senator MELCHER,
Russell Senate Office Building,
Washington, D.C.

DEAR SENATOR MELCHER: We are in receipt of your response to our mailgram regarding B.I.A.'s request for Proposals (RFP's) to waste federal money in performing duplicate Land Classification Studies. We do not agree with your assessment of the depth of the study made on the basis of information you received from the B.I.A.

Our requests for your assistance in this matter are not frivolous. The problem is of grave concern to the Blackfeet Tribe based on our personal knowledge as to the indepth level of Land Classification Studies made and a knowledge of the reason's B.I.A. desires to conduct the duplicate studies.

The information you received from B.I.A. is simply untrue. The Land Classification studies are of evidentiary character and are in proper order to be used in litigation. We are cognizant of the level of the Land Classification studies done and have collaborated on this with our attorney. We are inclined to believe what we have personally evidenced. We are more inclined to rely on our attorney's unbiased opinion as to the evidentiary character of Land Classification Studies than B.I.A.'s perception clouded by obvious conflicts of interest.

We would ask for your further assistance in supporting the Blackfeet in securing the funding for Water administration, planning and development. There is available $700,000.00–$800,000.00 and possibly more counting this year's money. We are asking that the Blackfeet be provided this money through 638 Contract.

We respectfully request your assistance in this matter.

Sincerely,

EARL OLD PERSON,
Chairman, Blackfeet Tribal Business Council.

[Telegram]

BROWNING, MONT., *September 22, 1982.*

Attn. Max Richtman.
Senator JOHN MELCHER,
Dirksen Senate Office Building,
Washington, D.C.

DEAR SENATOR MELCHER: We advised you previously of the wasteful expenditure of money by Billings area office to restudy Blackfeet soils. It is our understanding that the BIA is about to contract wih private firms for 100s of thousands of dollars before the close of this fiscal year. Could we seek your immediate assistance to inquire with respect to this wasteful expenditure, which has been rejected by the Blackfeet Tribe and will not benefit the Blackfeet. Time is of essence here. Apparently the deadline to let the contract for this fiscal year's money is Friday September 24, however contract could still be let after Friday if the attention is to utilize next years funding, we would appreciate your assistance on our behalf.

EARL OLD PERSON,
Chairman, Blackfeet Tribal Counsel.

[Telegram]

BROWNING, MONT., *September 2, 1982.*

Attn. Max Richtman.
Senator JOHN MELCHER,
Senate Office Building,
Washington, D.C.

DEAR SENATOR MELCHER: Urgently request your intervention on behalf of the Blackfeet Tribe to effectuate the cancellation of requests for proposal (RFP) advertised August 13, 1982, by Bureau of Indian Affairs/Billings area. The bids to be let September 9, 1982. Work proposed in RFP's constitute a duplication of studies already performed in depth, and thus entails a waste of public money. The Blackfeet have submitted a proposal to perform work necessary to the tribe's management. Planning for, and development of its water resources, the proposal to be funded with ten year plan money. Our request is to contract for the available funding pursuant to PL 93–638. We have had an ongoing request to contract for the money since January 1981 and have been consistently ignored and refused by BIA. Bureau of Indian Affairs efforts to let the contract to a private firm is a repeat of last year's effort to exclude the Blackfeet from the contracting process, and to waste the money in performing duplicate studies. The Blackfeet Tribe is in a better position to determine its needs and have therefore submitted a proposal with the plan on how the available funding can be more efficiently and productively utilized under contract with the Blackfeet Nation. On August 30, the Blackfeet Tribe was finally informed that the BIA/Department of Interior is soliciting bids pursuant to an RFP to undertake additional soil and land classification studies which have already been completed in depth. Along with the proposed waste of public funds to perform duplicate studies, the Blackfeet Tribe is concerned and believes, based on information received from reliable sources, that the Bureau of Indian Affairs proposal has as its sole objective the intentional reduction of the irrigable land within the Blackfeet Indian Reservation, that new studies would be utilized by the Solicitors Office of the Department of Interior and Department of Justice to greatly reduce the tribe's legal entitlement to water from the Milk River, the Saint Marys River, Birch Creek, Cut Bank Creek, the Two Medicine River and other stream and tributaries and acquifers which arise upon, border, traverse and otherwise underlie the Blackfeet Reservation. We most respectfully ask your support in assisting the Blackfeet in contracting for the funding under 638 contract with BIA and in the cancellation of the RFPs' advertising. We are sending you a copy of the proposal we have submitted for funding. We would appreciate your immediate response to our plea and would welcome an opportunity for a meeting with you. If you have any questions, please contact me or Geraldine Gordon at 406–338–7278. Thank you for your assistance in this matter last year.

EARL OLD PERSON,
Chairman, Blackfeet Tribal Business Council.

U.S. Senate,
Select Committee on Indian Affairs,
Washington, D.C., January 27, 1982.

Geraldine Gordon,
Browning, Mont.

Dear Geraldine: By, now, you already know that the contract proposal for soil studies on the Blackfeet Reservation has been cancelled.

Enclosed you will find a letter from Mr. Theodore C. Krenzke, Acting Deputy Assistant Secretary for Indian Affairs. It should answer the other issues that you also raised in your mailgram to me.

If I can ever be of service to you again, please feel free to contact me.

Best regards.

Sincerely,

John Melcher,
Ranking Minority Member.

Enclosure.

U.S. Department of the Interior,
Bureau of Indian Affairs,
Washington, D.C., November 27, 1981.

Hon. John Melcher,
U.S. Senate,
Washington, D.C.

Dear Geraldine: By, now, you already know that the contract propisal for soil ing an inquiry from Ms. Geraldine Gordon of the Blackfeet Tribe. Ms. Gordon expressed several concerns regarding technical studies conducted by the Bureau of Indian Affairs (BIA) that involve the water rights of the Blackfeet Tribe.

The request for proposal for the soils studies that Ms. Gordon mentioned has been cancelled. Our Billings Area Office is in the process of reassessing the requirements for technical studies on the Blackfeet Reservation.

Ms. Gordon is also concerned that the BIA and the Department of Justice will negotiate a water rights settlement with the State of Montana on behalf of the Tribe and that these Federal agencies will file water claims with the State on behalf of allottees. The Federal Government does not intend to negotiate with the State Reserved Water Rights Commission if the Tribe does not choose to negotiate and is aware of no basis to do so under State statute.

As you are aware, the United States filed suit to adjudicate the water rights of the Blackfeet Tribe in April 1979. The suit was dismissed in favor of State court proceedings and we have appealed the dismissal to the 9th Circuit Court of Appeals. We have not made a determination regarding whether or not the Federal Government will file water claims with the State court on behalf of the Blackfeet Tribe if the 9th Circuit Court does not rule by January 1, 1982, which is the current deadline for filing under State statute. However, we have requested the State Attorney General to extend the filing deadline, and we understand that he has done so.

Finally, Ms. Gordon expresses a desire to have water planning and development studies produced by direct contract with the Tribe. The BIA strongly supports the concept of direct contracting with tribes to produce long-term water development plans and information needed for negotiated settlement of water rights.

Since receiving your inquiry, the Chairman of the Blackfeet Tribal Business Council has, by letter of November 5, appealed the actions of the Billings Area Director to the Assistant Secretary. A thorough review of the policy and procedures is being made. We will inform you of our decision as soon as practicable.

If we can be of further assistance, please let us know.

Sincerely,

Theodore C. Krenzke,
Acting Deputy Assistant Secretary—Indian Affairs (Operations).

Senator Melcher. After the tribal council passed the resolution stating that because, in your view it is a duplicate study, that there would be no access allowed on the reservation, were you consulted by the people who were making the proposals for this contract?

Mr. Old Person. I do not recall.

Senator Melcher. You were not?

Mr. Old Person. No.

Senator **Melcher.** Were you consulted by the Bureau of Indian Affairs?

Mr. **Old Person.** No.

Senator **Melcher.** By neither?

Mr. **Old Person.** No.

Senator **Melcher.** Did a Mr. Jennings approach the tribal council? We have been informed that Mr Jennings, formerly Assistant Area Director in Billings, approached the tribal council about access. Is that correct?

Mr. **Old Person.** Not to the council.

Senator **Melcher.** To yourself?

Mr. **Old Person.** No.

Senator **Melcher.** To your knowledge did he visit the reservation?

Mr. **Old Person.** There was just one individual who was with a group on our reservation. This was 3 or 4 weeks ago, I think.

Senator **Melcher.** Who was the individual?

Mr. **Old Person.** I do not remember the name, but he told me: "I am going to be one of the members that is going to come out on the reservation."

Senator **Melcher.** What group did he represent?

Mr. **Old Person.** I think he is with the Bureau of Indian Affairs.

Senator **Melcher.** With the Bureau of Indian Affairs?

Mr. **Old Person.** Yes; at least that is the group that was there, a group of people from the Bureau.

Senator **Melcher.** Were they accompanied by anyone?

Mr. **Old Person.** They were there for some other reasons. But he told me that he was going to be one of the members that is going to come for the study.

Senator **Melcher.** For the soil study?

Mr. **Old Person.** Yes.

Senator **Melcher.** What was your response?

Mr. **Old Person.** Well, he just made a very short statement and I did not say anything. I just agreed that, I guess, he was the man that was going to come. But, I assumed that he understood our stand.

Senator **Melcher.** Well, how have you communicated your position? Was a copy of the tribal council resolution prepared and sent to the Department of the Interior?

Mr. **Old Person.** Right, we channeled it through the normal channels.

Senator **Melcher.** What are the normal channels?

Mr. **Old Person.** Through the superintendent, on to the Area Director, on to the Interior Department?

Senator **Melcher.** Do you know George Jennings?

Mr. **Old Person.** Yes.

Senator **Melcher.** Has he been on the reservation in the past several months?

Mr. **Old Person.** No.

Senator **Melcher.** Not to your knowledge.

Mr. **Old Person.** Not to my knowledge.

Senator **Melcher.** In the proposal prepared by CH2M Hill, at the request of the Department of the Interior, they state that an employee of their's, George Jennings, would consult with the tribe concerning access for the soil study that they are proposing to do and for which they received a contract. That is the reason I ask you.

Do you know, Mr. Boggs?

Mr. **Boggs**. I do not think it was Mr. Jennings. I think it was Mr. Mickelson. You see, I am the chairman of the Land Board and Water Department for the Blackfeet.

Senator **Melcher**. Who is Mr. Mickelson?

Mr. **Boggs**. I call this Mr. Mickelson, Mr. Twitchell.

Senator **Melcher**. Pardon me?

Mr. **Boggs**. Mr. Twitchell just mentioned him in his statement. Mr. Twitchell perceived——

Senator **Melcher**. Is Mickelson employed by CH2M Hill?

Mr. **Boggs**. Yes. And when I heard of the proposal by the BIA to contract with CH2M Hill, we made inquiries and finally found out how to get a hold of them and I think it was Mickelson that I talked with in Boise by telephone and informed him of the resolutions.

Senator **Melcher**. What date did you talk to him?

Mr. **Boggs**. Oh, this was when this contract was first made. It must have been the last of December, or the first part of January.

Senator **Melcher**. All right.

Mr. **Boggs**. But I informed him, by telephone, of the resolutions that we had made barring the duplication of studies, or the studies to be redone on the reservation, and told him that we had taken the stand that we were not going to allow anyone on the reservation to do this work. He informed me at that time that he was taking orders from the BIA; he was not taking orders from the tribe.

Senator **Melcher**. All right. This was after they had submitted their proposal, but prior to receiving the contract then.

Mr. **Boggs**. Well, they had told us that they had awarded the contract to this company. Mr. Whitesell informed me of this, and also Mr. Cole.

Senator **Melcher**. When did they inform you of that?

Mr. **Boggs**. I do not remember the dates. I think it was in January.

Senator **Melcher**. Was it prior to January 31?

Mr. **Boggs**. I am not sure.

Senator **Melcher**. When was your conversation then?

Mr. **Boggs**. It was after I talked with Cole.

Senator **Melcher**. Did you call or did he place the call?

Mr. **Boggs**. I called.

Senator **Melcher**. After reviewing your telephone logs, would you submit for the record of this hearing the date that call was made?

Mr. **Boggs**. I think I can find out from the log, yes.[1]

Senator **Melcher**. I have assumed, but perhaps we better know for sure, in discussing this with Mr. Mickelson, which I judge was your first contact with a representative of CH2M Hill, did you make it clear that the tribal council's resolution was based on a feeling that: No. 1, that this was a duplication of a study already completed; and, No. 2, that the tribe felt, as Earl has previously expressed, that it was their right to make the determination of how they utilized soil studies on the reservation?

Mr. **Boggs**. Yes, I informed him of this and told him that we would mail him a copy of the resolution.

Senator **Melcher**. Which you did?

Mr. **Boggs**. Which I am sure Geraldine Gordon did.

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[1] See p. 62.

Senator MELCHER. Was it mailed? Would you stand and identify yourself for the reporter.

Ms. GORDON. I am Geraldine Gordon and I contacted Mr. Mickelson.

Senator MELCHER. By mail. I do not suppose you know the date, do you Geraldine?

Ms. GORDON. I think it was probably around March or February.

Senator MELCHER. Might it have been early February rather than late December or early January?

The reason I ask that is because the contract was let, we were advised, January 31. Please supply that for the record, Mr. Boggs; on what date the call was made.[1] I think it would help us.

Senator MELCHER. That is all we have. Thank you, very much. Without objection, Mr. Old Person's written testimony will be made a part of the record.

[The statement follows:]

PREPARED STATEMENT OF EARL OLD PERSON, CHAIRMAN, BLACKFEET INDIAN TRIBE, BLACKFEET INDIAN RESERVATION, BROWNING, MONT.

I am Earl Old Person, Chairman of the Blackfeet Indian Tribe, Blackfeet Indian Reservatian, Browning, Montana. I wish to thank the Committee for holding this hearing and to thank the Committee for permitting me to testify respecting the issues so crucial to the Blackfeet Indian Tribe and to me personally as Chairman of that Tribe.

INTRODUCTION

I have endeavored to comprehend why the Department of Justice would be so insistent to create a crisis between the Blackfeet Indian Nation and the Bureau of Indian Affairs. The only sensible response that I can perceive of is that the Department of Justice has two objectives, both of which become manifest to this Committee if it examines the Motion submitted by my Tribe to the Supreme Court on March 22, 1983.[2]

In that Motion, based upon undeniable facts, the Tribe charges that the Department of Justice seeks: (1) drastically to reduce the Blackfeet water rights for the benefit of the Secretary of the Interior, whose interests are diametrically opposed to the Tribe's interests, but whom the Department of Justice seeks to represent while simultaneously forcing that Department's representation on the Blackfeet Tribe; and (2) to force upon the Blackfeet Tribe the jurisdiction of the State of Montana.

May I stress here that the Blackfeet Indian Tribe rejects out of hand both of those objectives which are sought by the Department of Justice. As part of its plan to achieve those objectives, the Department of Justice has, in the words of Senator Melcher, "prodded" the Bureau of Indian Affairs into a contract for soil and land classification studies, which contract is at once wasteful, needless, and possibly fraudulent.

It is my personal view that the crisis created by the Bureau of Indian Affairs, giving rise to this hearing, is part of Secretary Watts' termination policy for the American Indians. There can be no doubt that the Department of Justice, in its anxiety to carry out the two objectives set forth above, is fulfilling Secretary Watt's anti-Indian bias.

I am correct when I tell this Committee that the very survival of the Blackfeet Indian Tribe is at stake. Not only is the Department of Justice seeking vastly to reduce my Tribe's invaluable reserved rights to the use of water by seeking to force upon it the jurisdiction of the State of Montana, but further that Department strikes at the inherent power of my Tribe to administer, control, and allocate its reserved rights.

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[1] See p. 62.

[2] *Arizona* v. *San Carlos Apache; Montana* v. *Northern Cheyenne Tribe* [THE ADSIT CASES], Nos. 81-2147 and 81-2188, in the Supreme Court of the United States, "Motion to Suspend All Proceedings in this Court Respecting the Water Rights of the Blackfeet Indian Tribe, Browning, Montana, and to Preclude the Solicitor General or Any Other Attorney of the Department of Justice From Purporting to Represent That Tribe in These Proceedings and Points and Authorities in Support."

It is no exaggeration to declare that, in the arid and semi-arid West, the Tribe's rights to the use of water are life itself and my Tribe's powers to administer those rights are part of its authority to exercise self-government.

In the paragraphs which follow, I will outline to you the conduct of the Department of Justice and of the Department of the Interior which will clearly demonstrate their irreconcilable conflicts of interest.

POSSIBLE WASTE, FRAUD, AND ABUSE ARE NOT ALL THAT ARE INVOLVED HERE

As can be seen, the implications of this hearing go far beyond the language contained in this Committee's "Notices of Hearing" in which it is declared that the matter pertains to: ". . . the disbursement of funds by the Bureau of Indian Affairs to do a study of the irrigable acres on the Blackfeet Reservation in Montana. . . ."

At my request, the Blackfeet Tribal Council, governing body of the Blackfeet Indian Nation, has adopted a resolution, in effect, seeking time so that we may understand all of the implications of the new contract entered into by the Bureau of Indian Affairs. I recognize that the confrontation with the Bureau of Indian Affairs, still on-going, gave rise to my Tribe's request for this hearing. There was, however, no alternative to exposing the conduct of the Bureau of Indian Affairs. That agency is effectively attacking my Tribe, its members, and its reserved rights to the use of water.

All of the information that I have been able to obtain points to the fact that the contract was entered into at the "prodding of the Justice Department." As stated in the Introduction, that agency is not acting for the benefit of my Tribe. Moreover, my Tribe has specifically rejected any representation by the Department of Justice in litigation involving our water rights.

I did not personally want a confrontation with Secretary Watt and the Bureau of Indian Affairs over my Tribe's water right. My record of nonconfrontation with the entrenched bureaucracy is one of which I am proud. Yet neither my Tribe nor I will tolerate the Bureau of Indian Affairs intentionally seizing my Tribe's reserved water rights by contract or otherwise for the benefit of the Milk River Federal Reclamation Project administered by contract by Secretary Watt. There is strong reason to believe that the entire objective of the contract entered into by the Bureau of Indian Affairs over the obdurate objection of my Tribe is greatly to reduce my Tribe's water rights for the benefit of Secretary Watt and other adverse claimants.

A BUREAUCRATIC BLACKOUT OF INFORMATION CREATES THIS CONTRIVED CRISIS

I am committed reasonably to avoid the confrontation created by the Bureau of Indian Affairs and the Department of Justice with the Blackfeet Indian Tribe. Yet I will neither compromise my Tribe nor myself to avoid that confrontation. As reviewed above, the insistence of the Bureau of Indian Affairs and the Department of Justice to send persons upon our Reservation to make needless, wasteful, and perhaps fraudulent studies is wholly unwarranted. As will be reviewed, the Tribe presently has completely adequate and wholly acceptable studies which the Bureau of Indian Affairs and the Department of Justice, by their new studies, are seeking to attack. The course of conduct of the Bureau of Indian Affairs and the Department of Justice is part and parcel of a much broader course of conduct to which my Tribe has been subjected and with which I am personally confronted.

A studied, unconscionable blackout has been practiced by the Bureau of Indian Affairs and the Department of Justice in regard to the Blackfeet reserved water rights. As stressed above, in terms most clear and unequivocal, the Department of Justice has been fully informed that it is *not* to represent the Blackfeet Indian Tribe by reason of its all-encompassing conflicts of interest. Yet I am advised that the Billings Area Office of the Bureau of Indian Affairs has formulated additional new and elaborate plans to carry out the wishes of the Department of Justice respecting the economic feasibility of our lands and proposed designs for irrigation. I am astounded that, while this Committee is investigating one contract for further additional studies of my Tribe's water rights, the Bureau of Indian Affairs is now planning additional studies as to economic feasibility and proposed project design.

I did not receive a copy of those plans prepared by the Billings Office of the Bureau of Indian Affairs. I am advised it is entitled "Historical Back Ground of the Blackfeet Land Classification Study, 1983," and that copies of those plans have been submitted to this Committee.

If my information is correct, those new studies are, in part, to involve lands on my Reservation that are presently being irrigated and will undertake to determine whether it is economically feasible to irrigate lands that are now being irrigated. If it is determined—by someone concerning whom I have no knowledge—that those lands may not be economically irrigated for reasons concerning which we have no knowledge, then the Tribe could be deprived of water to irrigate those lands.

I demand to know about those new studies before any other action is taken. I request in particular that this Committee assist my Tribe in its effort to stop the bureaucracy in its on-going blackout of information.

In my Tribe's Motion to the Supreme Court asking for protection against the conduct of the Department of Justice, we reviewed the critical facts concerning the blackout of information practiced by that Department against my Tribe. Stressed there is the fact that we were never at any time informed as to the nature or character of the proceedings that had been initiated purportedly on behalf of our Tribe. We were given no information respecting the *Adsit* cases in the Federal District Court, the Appellate Court, or the Supreme Court. Never at any time was there communication between the Department of Justice and my Tribe.

It is un-American, un-Constitutional, and antihuman for the bureaucracy to be permitted to run roughshod over my Tribe and other Western Indian Tribes. Yet, it is manifest here that that is the practice and procedure now on-going by the Justice Department, using the Bureau of Indian Affairs as a front.

ISSUES BEFORE THE SUPREME COURT RENDER MOOT THIS NEEDLESS CONFRONTATION BROUGHT UPON MY TRIBE BY THE ENTRENCHED BUREAUCRACY

This Committee is undoubtedly aware of the pendency in the Supreme Court of the all-important case of *Montana* v. *Northern Cheyenne Tribe*, the *Adsit* cases, to which reference was made in my introduction. That is one of the reasons why I suggest to this Committee that this hearing involves a created crisis. None of us knows what the outcome of the *Adsit* cases will be until the Supreme Court renders its decision. If the *Adsit* decision is sustained, this matter is rendered totally moot. Under those circumstances, there is no possible justification for the proposed studies giving rise to this hearing. This matter has been stressed to the Bureau of Indian Affairs officials, it being pointed out to them that *Adsit* is highly favorable to the Blackfeet Indian Tribe. Hence, if the *Adsit* cases are sustained in part or totally sustained, the vast expenditures of funds cannot be justified. Both the Department of Justice and the Bureau of Indian Affairs seek to ignore that fact in pressing upon my Tribe these wholly unwarranted studies.

In the event of litigation, as subsequently reviewed, the Tribe can and will rely upon the Morrison-Maierle studies that have been completed and accepted by both the Tribe and the Bureau of Indian Affairs.

It is incredible to me that the Department of Justice has so aggressively attacked the *Adsit* decision. There, the Court of Appeals upheld the immunity of the Blackfeet Indian Tribe and other Tribes similarly situated from state jurisdiction and control. There is thus presented to this Committee a situation in which the Department of Justice, while purporting to represent my Tribe, is attacking the *Adsit* decision which is so favorable to us.

For the reasons expressed, I request this Committee to stop the disbursement of funds in connection with the pending contract and thus avoid the waste of funds so greatly needed by my Tribe.

MORRISON-MAIERLE STUDIES APPROVED AND ACCEPTED BY THE TRIBE AND BY THE BUREAU OF INDIAN AFFAIRS

I have stressed to this Committee the unknown factors that, in my view, render it frivolous for the Department of Justice to spend huge sums of money to investigate issues which quite reasonably can be declared moot. I, nevertheless, wish to make this fact clear: The Blackfeet Indian Tribe has carefully analyzed the excellent material that has been prepared by Morrison-Maierle connection with the Blackfeet Indian water rights. I have been advised, and I accept that advice, that the Morrison-Maierle material is scientifically complete and correct. The Morrison-Maierle material has been examined by the Tribe's experts and has been approved by them. That material is presently available as evidence to preserve and protect the Tribe's reserved water rights if those rights are forced into an adjudication.

I reject out of hand the waste of a million dollars of Bureau of Indian Affairs funds to restudy our water rights under the prevailing circumstances. May I bring to this Committee's attention this fact: Repeatedly my Tribe has requested the Bureau of Indian Affairs to provide it with funds to the end that the Tribe can proceed to develop the hydropower potential on our reservation and otherwise to investigate water requirements. Our vast water resources, which have been markedly neglected down through the years, must be investigated to the end that they may be utilized.

It shocks the conscience when I realized that for two separate funding periods the Bureau of Indian Affairs, rather than providing funds to my Tribe, permitted those funds to revert to the Treasury rather than permitting my Tribe to use those funds.

I will assure this Committee that the attack upon my Tribe by the Bureau of Indian Affairs is a well-coordinated, well-planned effort to strip my Tribe of its water rights for the benefit of the Bureau of Reclamation and to subvert my Tribe to the jurisdiction of the State of Montana.

CONCLUSION

I thank this Committee for its courtesy in convening this hearing and for permitting me to present to it the grave problems outlined above.

It is my sincerest hope that this Committee will preclude the unconscionable waste of funds so greatly needed by my Tribe to develop its existing water rights and to guarantee its future economic development.

Mr. OLD PERSON. Senator.

Senator MELCHER. Yes.

Mr. OLD PERSON. The only thing that I might add, that I believe it was in February that Dick Whitesell, the Area Director from Billings, talked to me about the possibility of having John Fritz on our reservation, which I welcomed. I thought that would have been something worthwhile if he was able to make it to talk with the tribe, to talk to the people there. But that has not happened.

Again, I think Sid Mills and I talked about this. I expressed the idea that we discuss Whitesell. Sid Mills also expressed that this would be good if John was able to make it to the reservation and have a firsthand talk with the people, the tribal council on the reservation. But this has never taken place.

I do want it stated, for the record, that our elderly members were present at this meeting and they are our very concerned people.

Senator MELCHER. Thank you all, very much. Any statement that members of the tribe wish to make will be made part of the record at this point. Thank you.

[Subsequent to the hearing the following correspondence was received for the record. Testimony resumes on p. 79.]

THE BLACKFEET TRIBE
OF THE BLACKFEET INDIAN NATION
P. O. Box 850
BROWNING, MONTANA 59417

EXECUTIVE COMMITTEE

EARL OLD PERSON, CHAIRMAN
ARCHIE ST. GODDARD, VICE-CHAIRMAN
LEE WILSON, SECRETARY
ELOUISE C. COBELL, TREASURER

TRIBAL COUNCIL

EARL OLD PERSON
ARCHIE ST. GODDARD
LEE WILSON
LANE KENNEDY
DAN BOGGS
ROBERT "SMOKEY" DOORE
JOHN MURRAY
GEORGE KICKING WOMAN

April 25, 1983

RECEIVED MAY 0 2 1983

Senator John Melcher
U.S. Senate
Washington, D.C. 20510

Dear Senator Melcher:

This will refer to the April 12th Hearing before the Select Committee on Indian Affairs.

Documentation supporting the statements I made in the Hearing are enclosed here. Enclosures include:

1) Affidavit
2) Copy of February 11 date in my journal
3) Blackfeet Tribal Resolution #273-83
4) Letter from Earl Old Person, Chairman to Acting Area Director, Richard Whitesell
5) Blackfeet Tribal Resolutions Numbers 56-83 and 59-83
6) Letter from Earl Old Person to Solicitor General, Rex E. Lee

With respect to Geraldine Gordon's oral statement she cannot provide written documentation.

Thank you for providing the opportunity to have these issues investigated. We are deeply grateful.

If you have any questions, please call me at (406) 338-7278.

Sincerely,

Daniel C. Boggs

Daniel C. Boggs

Enclosures

DCB/cw

THE BLACKFEET TRIBE
OF THE BLACKFEET INDIAN NATION
P. O. Box 850
BROWNING, MONTANA 59417

EXECUTIVE COMMITTEE
EARL OLD PERSON, CHAIRMAN
ARCHIE ST. GODDARD, VICE-CHAIRMAN
LEE WILSON, SECRETARY
ELOUISE C. COBELL, TREASURER

TRIBAL COUNCIL
EARL OLD PERSON
ARCHIE ST. GODDARD
LEE WILSON
LANE KENNEDY
DAN BOGGS
ROBERT "SMOKEY" DOORE
JOHN MURRAY
GEORGE KICKING WOMAN

AFFIDAVIT

STATE OF MONTANA)
)ss:
County of Glacier)

I, DANIEL C. BOGGS, having been first duly sworn, upon oath, depose and says as follows:

1) That I am an enrolled member of the Blackfeet Tribe;

2) That I am a member of the Blackfeet Tribal Business Council which is the governing body of the Blackfeet Indian Nation and by the governing body of the Blackfeet Indian Nation, I have been designated Chairman of the Blackfeet Land Board which has full jurisdiction and control over the Invaluable Reserved Rights to the Use of Water with the Blackfeet Reservation title to which resides in the Blackfeet Tribe;

3) In fulfilling my responsibilities as Chairman of the Blackfeet Land Borad, I have been directed and authorized to take all necessary action on behalf of the Blackfeet Indian Nation including but not limited to the Tribe's responsibility in the cases of United States v. AMS Ranch and United States v. Aageson;

4) I have additionally been directed to take all necessary action to carry out the direction of the Tribe as spelled out in the Tribe's Resolutions, Numbers 58-83 and 59-83, adopted by the Tribe's governing body on November 3, 1983 pursuant to which the Blackfeet Indian Nation specifically rejected all further representation in the aforesaid cases and any other cases involving the Tribe's Reserved Rights to the use of water by reason of the all-encompassing conflicts of interest that permeate the conduct of the Secretary of the Interior and Attorney General and the staffs of those officers: I attach to this affidavit and make a part of it by reference to the same extent and with the same effect as if set forth herein in full the "MOTION TO SUSPEND ALL PROCEEDINGS IN THIS COURT RESPECTING THE WATER RIGHTS OF THE BLACKFEET INDIAN TRIBE, BROWNING, MONTANA, AND TO PRECLUDE THE SOLICITOR GENERAL OR ANY OTHER ATTORNEY OF THE DEPARTMENT OF JUSTICE FROM PURPORTING TO REPRESENT THAT TRIBE IN THESE PROCEEDINGS AND POINTS AND AUTHORITIES IN SUPPORT" submitted to the Supreme Court on March 22, 1983;

5) I further allege under oath that on February 11, 1933, in my official position, I discussed at length with Mr. Mike Nicholson of CH2M Hill, 700 Clearwater Lane, Boise, Idaho, the closing of the Blackfeet Reservation against anyone seeking to undertake further soils and land classification studies all as contracted for by the Bureau of Indian Affairs on January 31, 1983 with the firm, CH2M Hill;

6) I further allege that in my discussion with Mr. Nicholson of CH2M Hill, I stressed to him that the Blackfeet Indian Nation had rejected further studies by CH2M Hill or any other parties and that the Tribe would not tolerate that firm coming upon the Blackfeet Indian Reservation to conduct studies all as provided for in the contract of January 31, 1983;

7) I further allege that on February 11, 1983, Earl Old Person, Chairman of the Blackfeet Tribal Business Council advised Richard Whitesell, Acting Area Director, Bureau of Indian Affairs, Billings, Montana, that the Tribe will not allow contractors on the Reservation for the purpose of conducting soils and land calssification studies. Attached to the affidavit and made part of it by reference is a copy of Chairman Old Person's February 11, 1983 letter to which reference is made in the paragraph;

8) I further allege that Chairman Earl Old Person, filed with the Select Committee, Indian Affairs, U.S. Senate, a full and complete statement reiterating and reaffirming the rejection by the Department of Justice and reiterated and reaffirmed the refusal by the Blackfeet Indian Nation to permit CH2M Hill or any other parties to come up on the Blackfeet Indian Reservation to conduct studies in connection with the Tribe's Reserved rights to the use of water and in connection with the oral and written statement submitted by Earl Old Person, Chairman of the Blackfeet Tribe. There is attached a copy of a Resolution adopted April 9, 1983 by the Tribal Council reaffirming the Tribes position and policies rejecting further studies on the Blackfeet Indian Reservation in connection with its Reserved Water Rights;

9) I further allege and aver that on April 21, 1983, I was called on the telephone by the aforesaid Mr. Mike Nicholson who represents CH2M Hill and was requested by Mr. Nicholson that his firm be permitted to enter upon the Blackfeet Indian Reservation;

10) I further allege that Mr. Nicholson was again advised of the Policy of the Blackfeet Indian Nation to revent further studies being made upon the Blackfeet Indian Reservation by CH2M Hill or anyone else and that the Blackfeet Tribal Business Council is resolute in preventing studies of the character for which CH2M Hill has contracted to do.

Further, Affiant sayeth not.

DATED this 25 day of April, 1983.

Daniel C. Boggs
DANIEL C. BOGGS

VERIFICATION

I, DANIEL C. BOGGS, being first duly sworn, upon oath, deposes and says: That I am the Affiant in the foregoing Affidavit and that I have read the contents thereof and that the matters and things therein contained are true of my own knowledge and belief.

Daniel C. Boggs
DANIEL C. BOGGS

SUBSCRIBED AND SWORN to me before this 25th day of April, 1983.

Selma Lawrence
Notary Public for the State of Montana
Residing at Browning, Montana
My Commission Expires:

(NOTARY SEAL)

NOTARY PUBLIC for the State of Montana
Residing at Browning, Montana
My Commission Expires June 20, 1988

FEBRUARY 10

Land office 6:30 AM. Called Bauers - phone didn't work
Mass 7:30 - 8:00 = met w/ Buster
Called R. Ellis. Met on problem &
~~Lunch~~ Ron Holt. Lunch with
Ross Cannon at White Buffalo.
P.M. = Met w/ ranchers regarding
Elkton dist. - Called CH2M Hill,
informed them of resolutions to
stay off Reservation. Met with
Council & B.I.A. staffs concerning
meetings in Billings

FEBRUARY 11

THE BLACKFEET TRIBE

OF THE BLACKFEET INDIAN NATION
P. O. Box 850
BROWNING, MONTANA 59417

EXECUTIVE COMMITTEE

EARL OLD PERSON, CHAIRMAN
ARCHIE ST. GODDARD, VICE-CHAIRMAN
LEE WILSON, SECRETARY
ELOUISE C. COBELL, TREASURER

TRIBAL COUNCIL

[illegible]

RESOLUTION

Number: 273-83

WHEREAS: The Blackfeet Tribal Business Council is the duly constituted governing body of the Blackfeet Indian Nation, and

WHEREAS: The Blackfeet Tribal Business Council has been organized to represent, develop, protect and advance the views, interest education and resources of the Blackfeet Indian Nation, including but not limited to its Water Resources.

WHEREAS: The Blackfeet Tribal Business Council is empowered, authorized and has the responsibility of preserving, protecting and utilizing its invaluable rights to the use of water title to which resides in the Blackfeet Indian Nation all as declared in its Treaty of 1855, and

WHEREAS: The Secretary of the Interior, in clear violation of his obligation to the Blackfeet Indian Tribe as the principal agent for the United States Trustee for the Tribe, has systematically violated the Reserved Water Rights of the Tribe in connection with the Federal Reclamation Project and likewise has systematically suppressed the development and exercise of the Tribe's Rights to the use of water, and

WHEREAS: The Department of Justice, acting in concert with the Secretary of the Interior, is aggressively seeking to violate, denigrate and to diminish the Tribe's Reserved Water Rights for the benefit of non-Indian claimants off the Reservation, and

WHEREAS: The Attorney General of the United States, Department of Justice, has purported to represent the Tribe in the cases of United States v. AHS Ranch, et. al. and United States v. Aageson, et. al. by consistently adhering to policies and practices, intentionally, that are diametrically opposed to the interests of the Blackfeet Indian Nation and its Rights to the use of water; and

WHEREAS: The Department of Justice has systematically and intentionally withheld information from the Blackfeet Indian Nation as to its aggressive attacks upon the Tribe's invaluable Reserved Rights to the use of water, and

Resolution # [illegible]-83

WHEREAS: Without the knowledge, acquiescence, agreement or consent of the Blackfeet Indian Tribe, the Department of Justice attacked the very favorable Decision of the United States Court of Appeals for the Ninth Circuit in the case of the Northern Cheyenne Tribe v. Adsit, 668. F2d 1080; and

WHEREAS: The Attorney General and Solicitor General of the Department of Justice, and members of their staffs, engaged in arbitrary, capricious and bad faith conduct in attacking the Adsit decision while purportedly forcing upon the Blackfeet Indian Nation their unethical and unprofessional purported representation of the Blackfeet Tribe, and

WHEREAS: Immediately upon the Blackfeet Indian Nation being advised of the bad faith conduct of the Attorney General, Solicitor General and members of their staffs in the Department of Justice, the Blackfeet Indian Nation, which had been subjected to a total blackout of information as to the conduct of the Department of Justice and its arbitrary and capricious conduct in the cases in question, adopted on November 3, 1982, Resolution #59-83 in which "the Blackfeet Indian Nation specifically rejects the representation by Department of Justice in the aforesaid cases, United States v. AMS Ranch, United States v. Aageson, and declares that under no circumstances can the Attorney General acting through the Department of Justice adequately represent the Blackfeet Indian Nation in that litigation," and

WHEREAS: On the same date, the Blackfeet Indian Nation adopted Resolution #56-83 affirming and accepting the Soils and Land Classification Studies prepared for the Tribe by the Firm of Morrison-Maierle and specifically informed the Attorney General and the Secretary of the Interior and their staffs that they could not come upon the Blackfeet Indian Reservation for the purpose of making new proposed soil and land classification investigations, and

WHEREAS: On November 8, 9, 1982, the Blackfeet Indian Nation acting through its governing body specifically informed representatives of the Department of Justice that the Department of Justice could no longer purport to represent the Blackfeet Indian Tribe and must remain off the Blackfeet Indian Reservation, and

WHEREAS: Irrespective of the undeniable bad faith conduct of the Department of Justice in violating the Attorney-client relationship between the Blackfeet Indian Nation and that Department and with full knowledge that on November 3, 1982, the Blackfeet Tribe had rejected further representation by the Department of Justice of the Tribe in all water resources litigation including United States v. AMS Ranch and United States v. Aageson, that Department without the knowledge, consent or acquiescence of the Blackfeet Indian Nation, filed with the Supreme Court of the United States the "Brief for the United States" in which it unethically, unprofessionally and in bad faith with full knowledge that the Tribe had rejected further representation of it, continued its attack upon the *Adsit* decision and illegally and in total bad faith recommended to the Supreme Court that the State of Montana could administer the Tribe's Reserved Rights to the use of Water, and

WHEREAS: On March 22, 1983, immediately upon receipt of the bad faith filing of the "Brief for the United States," the Blackfeet Tribe submitted to the Supreme Court the Motion entitled, "Motion to Suspend All Proceedings in This Court Respecting the Water Rights of the Blackfeet Indian Tribe, Browning Montana, and to Preclude the Solicitor General or any other Attorney of the Department of Justice from Purporting to Represent that Tribe in these Proceedings and Points and Authorities in Support," and

WHEREAS: In that Motion, the Blackfeet Indian Nation with specificity outlined to the Supreme Court the unethical, immoral and bad faith conduct of the Solicitor General and all other members of the Department of Justice who continued to represent to the Supreme Court, that those officials of the Department of Justice could force upon the Blackfeet Indian Nation their rejected and unethical conduct, and

WHEREAS: Continuing to purport to represent the Blackfeet Indian Nation, the Department of Justice, acting in concert with the Bureau of Indian Affairs, has contracted, in clear violation of the Tribe's Resolution #56-83 prohibiting the Department of Justice from coming on the Blackfeet Indian Reservation, to undertake additional studies of the character referred to above, and

WHEREAS: The Department of Justice continues to ignore the Tribe's Resolutions of November 3, 1982, #56-83 and #59-83 with the objective of causing irreparable and continuing damage to the Tribe, and

NOW THEREFORE BE IT RESOLVED: That the Blackfeet Indian Nation reiterates and reaffirms its earlier rejection of any representation by the Attorney General, Department of Justice, and all members of that Agency including the Solicitor General, and specifically declares that it will hold individually responsible, those officials who are continuing to purport to represent the Blackfeet Indian Tribe and to continue to force upon the Tribe their illegal, immoral, arbitrary and capricious representation which is permeated with bad faith, sham, fraud and chicanery, and

BE IT FURTHER RESOLVED: That Secretary, James G. Watt, and Attorney General, William French Smith, be specifically advised of the continued reprehensible conduct of the Department of Justice and their

Resolution # 270-83

illegal and immoral attempts to continue to force on the Blackfeet Indian Nation their unwanted representation and to advise the aforesaid Secretary Watt that he must take action forthwith to preclude further purported representation of the Tribe by the Attorney General, Department of Justice and that Official's staff, and

BE IT FURTHER RESOLVED: That the all encompassing conflicts of interest which permeate the conduct of Secretary Watt and Attorney General Smith and members of their staffs preclude them from representing the Tribe in any matters further pertaining to the Tribe's invaluable Reserved Rights to the use of Water, and

BE IT FURTHER RESOLVED: That the Chairman of the Blackfeet Indian Tribe and members of the Blackfeet Tribal Business Council and their General Counsel and Special Counsel respecting water resources be and they are hereby directed to take all appropriate action in the courts and acting with the Congressional Delegation to preserve and to protect the Tribe's Reserved Rights to the use of Water including but not limited to procuring an injunction against entry onto the Blackfeet Indian Reservation by the Department of Justice, the Department of the Interior or members of their staffs or persons under contract with those Agencies and otherwise to act to preserve and protect the Reserved Rights to the use of Water of the Blackfeet Reservation, and

BE IT FURTHER RESOLVED: That by this Resolution, the Blackfeet Tribal Business Council, the Governing Body of the Blackfeet Indian Nation, in the exercise of its inherent powers to protect and preserve its resources including its water rights, is fully committed to exercising those rights and to preclude the immoral bad faith of the Secretary of the Interior and Attorney General and members of their staffs from violating those rights.

ATTEST:

THE BLACKFEET TRIBE OF THE BLACKFEET
INDIAN RESERVATION

Lee Wilson
Lee Wilson, Secretary

Earl Old Person, Chairman

CERTIFICATION

I hereby certify that the foregoing resolution was adopted by the Blackfeet Tribal Business Council in a duly called, notice and convened Regular Session assembled for business on the 11th day of April 1983 with Six (6) members present to constitute a quorum. And by a vote of Six (6) members For and None (0) Opposed.

Lee Wilson
Lee Wilson, Secretary
Blackfeet Tribal Business Council

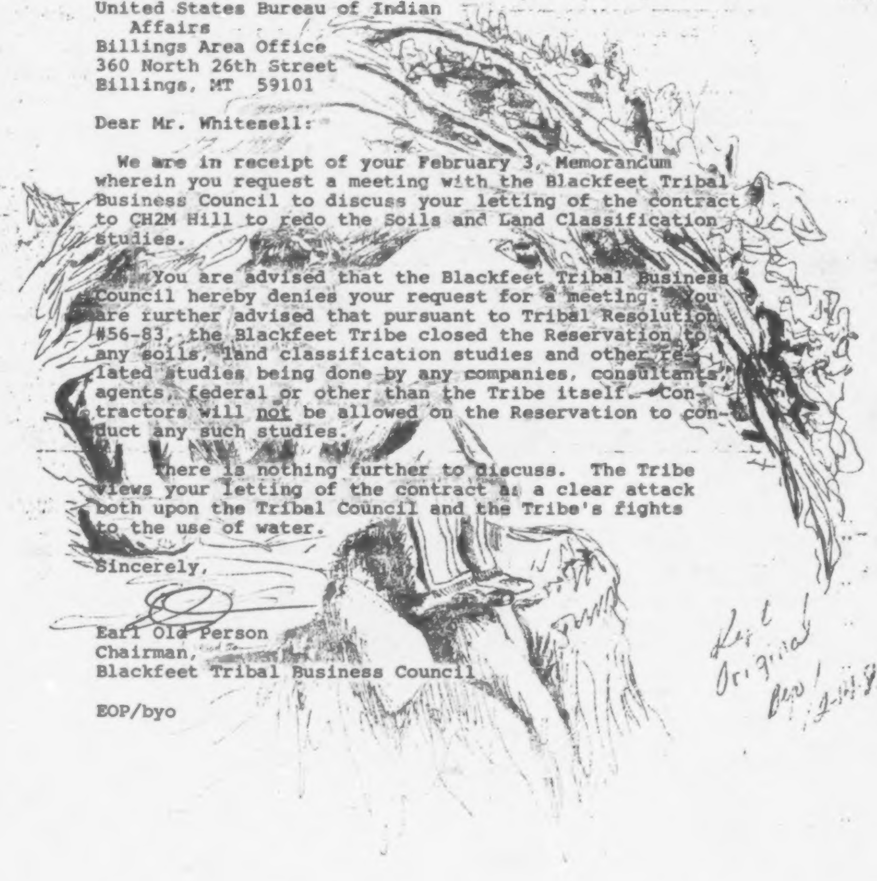
THE BLACKFEET TRIBE
OF THE BLACKFEET INDIAN RESERVATION
BROWNING, MONTANA 59417

EXECUTIVE COMMITTEE
EARL OLD PERSON, CHAIRMAN
ARCHIE ST. GODDARD, VICE-CHAIRMAN
CHARLES CONNELLY #1, SECRETARY
ELOUISE C. COBELL, TREASURER

TRIBAL COUNCIL
EARL OLD PERSON
ARCHIE ST. GODDARD
CHARLES CONNELLY #1
LELAND GROUND
LEONARD MOUNTAIN CHIEF
GEORGE KICKING WOMAN
JERRY SHOW
PHILIP M. RATTLER, JR.
JOE SHOW

February 11, 1983

Richard Whitesell
Acting Area Director
United States Bureau of Indian
Affairs
Billings Area Office
360 North 26th Street
Billings, MT 59101



Dear Mr. Whitesell:

We are in receipt of your February 3, Memorandum wherein you request a meeting with the Blackfeet Tribal Business Council to discuss your letting of the contract to CH2M Hill to redo the Soils and Land Classification studies.

You are advised that the Blackfeet Tribal Business Council hereby denies your request for a meeting. You are further advised that pursuant to Tribal Resolution #56-83, the Blackfeet Tribe closed the Reservation to any soils, land classification studies and other related studies being done by any companies, consultants, agents, federal or other than the Tribe itself. Contractors will not be allowed on the Reservation to conduct any such studies.

There is nothing further to discuss. The Tribe views your letting of the contract as a clear attack both upon the Tribal Council and the Tribe's rights to the use of water.

Sincerely,

Earl Old Person
Chairman,
Blackfeet Tribal Business Council

EOP/byo

Rec'd Original byo! 2-14-83

THE BLACKFEET TRIBE
OF THE BLACKFEET INDIAN RESERVATION
BROWNING, MONTANA 59417

EXECUTIVE COMMITTEE
EARL OLD PERSON, CHAIRMAN
ARCHIE ST. GODDARD, VICE-CHAIRMAN
LEE WILSON, SECRETARY
ELOUISE C. COBELL, TREASURER

TRIBAL COUNCIL
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LANE KENNEDY
DAN BOGGS
ROBERT "SMOKEY" DOORE
JOHN MURRAY
JOE SHOW
GEORGE KICKING WOMAN

RESOLUTION

NUMBER: 56-83

REJECTION OF BLACKFEET NATION OF FURTHER SOILS SURVEY & LAND CLASSIFICATION STUDIES AND CLOSURE OF RESERVATION FOR THOSE STUDIES.

WHEREAS: The Blackfeet Tribal Business Council is the duly constituted governing body of the Blackfeet Tribe within the exterior boundaries of the Blackfeet Indian Reservation, organized pursuant to Section 16 of the Act of June 18, 1934, and amendments thereof, and

WHEREAS: The Blackfeet Tribal Business Council has been organized to represent, develop, protect and advance the views, interests, and resources of the Blackfeet Reservation, and

WHEREAS: The Blackfeet Nation of the Blackfeet Indian Reservation, with headquarters in Browning, Montana, has sovereign powers inherent in it pursuant to which the Tribe exercises its own self government, and amoung those powers, the authority to preserve, protect, conserve and utilize and administer the Tribes invaluable reserved rights to the use of water in the streams which arise upon, traverse, border upon and underlie the Blackfeet Indian Reservation with the priority date in those reserved rights from time immemorial, and

WHEREAS: In the year 1979, working in close cooperation with the Bureau of Indian Affairs, Department of Interior, a principal agent of the United States, trustee, the Blackfeet Tribe obtained from the firm of Morrison-Maierle, Inc., Helena, Montana, a Soil Survey & Land Capability Classification for the Blackfeet Indian Reservation pursuant to which there was established the irrigable acres within the Blackfeet Indian Reservation, and

WHEREAS: The Morrison - Maierle Soil Survey & Land Classification has been determined by the Blackfeet Nation to be evidentiary in character and prepared in accordance with and meets all of the standards essential for such studies and is hereby declared to be reliable, complete and acceptable in all regards, and

WHEREAS: The Blackfeet Nation has been informed by the Bureau of Indian Affairs that, wholly with out reason or justification, the Bureau intends to initiate another additional soil survey & land classification upon the Blackfeet Indian Reservation duplicating the Morrison-Maierle study with the objective, that Tribe is informed and believes, of reducing the entitlement to rights to the use of water to which the Tribe holds title with the priority as declared, to be from time immemorial, and

WHEREAS: The Tribe is informed and believes and, therefore, declares that the Department of Justice, which seeks to force upon the Blackfeet Nation that Department's undesired, rejected, unwanted and highly suspect representation in ongoing litigation, has instigated the new surveys with the objective of reducing the quantity of water, to which the Blackfeet Nation is entitled from all sources in which the Tribe holds rights, for the benefit of the other non-Indian projects and purposes represented by the Department of Justice, and

WHEREAS: The Blackfeet Nation is at the present time investigating, assessing and determining the measure of its rights to the use of water in all of the streams that arise upon, traverse, border or underlie the Blackfeet Indian Reservation, and finds that the Secretary of the Interior, wholly without right or authority, has come upon the Blackfeet Indian Reservation and has constructed Sherburne Dam and maintains a reservoir on the Reservation and has confiscated, taken and diverted away from the Blackfeet Indian Reservation the waters of the St. Mary's River and likewise the waters of the Milk River for the benefit of the Milk River Federal Reclamation Project and by that conduct not only violates the Tribe's vested rights, but likewise unconscionably wastes hugh quantities of water from the St. Mary's and Milk Rivers', and

WHEREAS: In regard to other streams arising upon the Blackfeet Indian Reservation the Secretary of the Interior and agents of the officer have likewise failed properly to protect the Tribe's reserved rights and have, in fact, violated the Tribe's prior and paramount rights to the use of water for the benefit of other non-Indian projects and purposes, and

WHEREAS: The effort to initiate a new soil survey and land classification study by the Secretary of the Interior and his agents is solely for the purpose of violating the Tribe's invaluable rights to the use of water for non-Indian projects and purposes: and

NOW THEREFORE BE IT RESOLVED: That the Blackfeet Nation hereby affirms its title in and to its rights to the use of water in the streams and the water sources which arise upon, traverse, border or underlie the Blackfeet Indian Reservation and reasserts its priority from time immemorial in and to those invaluable and life sustaining rights to the use of water: and

BE IT FURTHER RESOLVED: That the Blackfeet Nation hereby rejects any and all further efforts by the Secretary of the Interior, his agents, officers and employees including but not limited to the Bureau of Indian Affairs, Department of Interior, and any and all parties, companies, consultants or other agencies, which may contract with the Secretary of the Interior or the Bureau of Indian Affairs to conduct the soil survey and land classification that has been and are hereby rejected by the Blackfeet Nation, and

BE IT FURTHER RESOLVED: That Blackfeet Tribal Resolution #523-82 rejecting proposed Land Classification studies is hereby incorporated into this Resolution and by this reference is made a part hereof as if set out verbatim, and

BE IT FURTHER RESOLVED: That the Blackfeet Nation specifically informs the Attorney General and the Secretary of the Interior, that those officers of the United States, trustee for the Blackfeet Nation, their officers, employees, agents or parties contracting with either the Attorney General or the Secretary of the Interior for the purpose of coming upon the Reservation to conduct additional soil surveys, land classification studies and other related investigations, must refrain from coming upon the Blackfeet Indian Reservation, and

BE IT FURTHER RESOLVED: That the Secretary of the Interior and the Attorney General and their representatives meet with the representatives of the Tribe in Billings, Montana, at the offices of the Bureau of Indian Affairs or the solicitors office, Department of Interior, for the purpose of resolving the on-going conflict between the Blackfeet Nation and the agencies of the federal government, to which reference has been made and affirmatively to adopt a program to protect - not violate- the Tribe's invaluable rights to the use of water.

ATTEST:

THE BLACKFEET TRIBE OF THE BLACKFEET
INDIAN RESERVATION

Lee Wilson
LEE WILSON, Secretary

EARL OLD PERSON, Chairman

CERTIFICATION

I hereby certify the foregoing resolution was adopted by the Blackfeet Tribal Business Council in a duly called, noticed and convened Special Session assembled for Business the 3rd day of November, 1982 with Eight (8) members present to constitute a quorm. And by a vote of Eight (8) For and None (0) Opposed.

(CORPORATE SEAL)

Lee Wilson
LEE WILSON, Secretary

THE BLACKFEET TRIBE
OF THE BLACKFEET INDIAN RESERVATION
BROWNING, MONTANA 5941

EXECUTIVE COMMITTEE
EARL OLD PERSON, CHAIRMAN
ARCHIE ST. GODDARD, VICE-CHAIRMAN
CHARLES CONNELLY #1, SECRETARY
ELOUISE C. COBELL, TREASURER

TRIBAL COUNCIL
EARL OLD PERSON
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HARLES CONNELLY #1
LELAND GROUND
ARD MOUNTAIN CHIEF
GEORGE KICKING WOMAN
JERRY SHOW
PHILIP M. RATTLER, JR.
JOE SHOW

TRIBAL OPERATIONS
OFFICE
NOV 15 1982
RECEIVED

RESOLUTION

NUMBER: 59-83

WHEREAS: The Blackfeet Tribal Business Council is the duly constituted governing body within the exterior boundaries of the Blackfeet Indian Reservation, and

WHEREAS: The Blackfeet Tribal Business Council has been organized to represent, develop, protect and advance the views, interests, education and resources of the Blackfeet Indian Reservation, and

WHEREAS: Historically the St. Mary's and Milk River arose upon the Blackfeet Indian Reservation and flowed from the Blackfeet Reservation in a state of nature, and

WHEREAS: By their Treaty of 1855, the Blackfeet Indian Nation reserved onto itself rights to the use of water in the St. Mary's River, the Milk River and the tributaries to those streams and all other streams that arise upon, traverse, border or underlie the Blackfeet Indian Reservation including but not limited to Birch Creek, Badger Creek, Two Medicine River, Cut Bank Creek and tributaries of those streams, and

WHEREAS: The Secretary of the Interior without right, power or authority entered upon the Blackfeet Reservation and constructed the Sherburne Dam the St. Mary Canal and other structures and components of the Milk River Federal Reclamation Project and without right, title of interest asserted and continues to assert against the Blackfeet Indian Reservation, rights to the use of water of the Milk River, the St. Mary's River and tributaries to those streams for the benefit of the Milk River Federal Reclamation Project, and

WHEREAS: The Attorney General acting by and through the Department of Justice initiated an action in the United States District Court for the District of Montana entitled United States v. Aageson, et. al. No. CV-79-21-GF; United States v. AMS Ranch, et. al. No. CV-79-22GF pursuant to which the Attorney General acting through the Department of Justice, purports to represent the Blackfeet Indian Nation and numerous other Indian Tribes and Nations in the state of Montana, and simultaneously to represent the Secretary of the Interior, the Bureau of Reclamation, the Bureau of Land Management, Glacier National Park and other agencies within the Department of the Interior and likewise purports to represent the Secretary of Agriculture, and simultaneously to represent numerous other agencies and instrumentalitites of the federal government all of which claim rights in and to the use of water here involved adversely to the Blackfeet Indian Nation, and

This is to attest that this is
a "TRUE COPY" taken from the
official file at the
BLACKFEET AGENCY.

WHEREAS: The Department of Justice purporting to represent the Blackfeet Indian Nation is simultaneously representing the Secretary of the Interior and the aforesaid departments and agencies and instrumentalities whose interests are diametically opposed to and adverse to the rights and interests of the Blackfeet Indian Nation in and to the rights to the use of water on the Milk River and St. Mary's River and all of the other above mentioned rivers which arise upon, border, traverse and otherwise underlie the Blackfeet Indian Reservation, and

WHEREAS: The United States Court of Appeals for the Ninth Circuit specifically, in references to the aforesaid cases, United States v. AMS Ranch, et. al. and United States v. Aageson, et. al., declared and ruled as a matter of law that where there are conflicts of interest in water rights litigation, the Attorney General and the Secretary of the Interior could not properly represent the said Tribes and that such representation by Attorney General acting through the Department of Justice is "inadequate" due to the all encompassing conflicts of interest of the character described above, and

WHEREAS: The Department of Justice seeks to force upon the Blackfeet Indian Nation and upon numerous other Tribes its unwanted and rejected representation which representation is permeated with irreconcilable conflicts of interest all as recognized by the United States Court of Appeals in the _Adsit_ and _San Carlos_ decisions, and

WHEREAS: The Attorney General, the Solicitor General, the Assistant Secretary of Land and Natural Resource Division filed an Amicus Curiae brief with the Supreme Court against the interests of the Blackfeet Nation and other tribes, illegally alligning themselves against the principles enunciated in the Ninth Circuit Court of Appeals of the United States in the _Adsit_ and the _San Carlos_ and related cases involving he "disclaimer issue"; now

THEREFORE BE IT RESOLVED: That the Blackfeet Indian Nation specifically rejects the representation by Department of Justice in the aforesaid cases, United States v. AMS Ranch, United States v. Aageson and declares that under no circumstances can the Attorney General acting through the Department of Justice adequately represent the Blackfeet Indian Nation in that litigation, and

BE IT FURTHER RESOLVED: That the Blackfeet Indian Nation specifically rescinds and declares null and void the Resolution #112-74, which purportedly permitted the Blackfeet Indian Nation to be represented by the Department of Justice in water rights litigation, the character and nature of which was not fully discribed to the governing body of the Blackfeet Indian Nation which would not have permitted the Department of Justice to represent it if the governing body of the Blackfeet Indian Nation had been advised of the all encompassing conflicts of interest which were condemned in the aforesaid _Adsit_ and _San Carlos_ decisions.

This is to attest that this is
a "TRUE COPY" taken from the
official file at the
BLACKFEET AGENCY.

Page 3
Blackfeet Tribal Resolution # 59-83

ATTEST:

THE BLACKFEET TRIBE OF THE BLACKFEET
INDIAN NATION

Lee Wilson

Lee Wilson, Secretary

Earl Old Person, Chairman

CERTIFICATION

I hereby certify that the foregoing resolution was adopted by the Blackfeet Tribal Business Council in duly called, noticed and convened Special Session assembled for business the 3rd day of November, 1982 with Eight (8) members to constitute a quorum and by a vote of Eight (8) members For and None Opposed.

(CORPORATE SEAL)

Lee Wilson

Lee Wilson, Secretary
Blackfeet Tribal Business Council

This is to attest that this is
a "TRUE COPY" taken from the
official file at the
BLACKFEET AGENCY.

THE BLACKFEET TRIBE
OF THE BLACKFEET INDIAN NATION
P. O. Box 850
BROWNING, MONTANA 59417

EXECUTIVE COMMITTEE

EARL OLD PERSON, CHAIRMAN
ARCHIE ST. GODDARD, VICE-CHAIRMAN
LEE WILSON, SECRETARY
ELOUISE C. COBELL, TREASURER

TRIBAL COUNCIL

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LEE WILSON
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DAN BOGGS
ROBERT "SMOKEY" DOORE
JOHN MURRAY
GEORGE KICKING WOMAN

15 April 1983

Mr. Rex E. Lee
Solicitor General
Department of Justice
Washington, DC 20530

Dear Mr. Lee:

This will refer to the conversation held April 14, 1983 between Counsel for the Blackfeet Indian Nation and Deputy Solicitor General, Louis F. Claiborne. Reference was made in that conversation to the "Motion To Suspend All Proceedings In This Court [Supreme Court] Respecting The Water Rights Of The Blackfeet Indian Tribe, Browning, Montana, And To Preclude The Solicitor General Or Any Other Attorney Of The Department Of Justice From Proporting To Represent That Tribe In These Proceedings And Points And Authorities In Support" submitted on March 22, 1983 to the Supreme Court.

Outlined there with specificity is the rejection by the Blackfeet Indian Nation of the Department of Justice as legal representative of the Blackfeet Indian Nation in the cases to which that Motion pertains, *Arizona* v. *San Carlos Apache Tribe, et al*; *Montana* v. *Northern Cheyenne Tribe* [the *Adsit* cases] Nos. 81-2147, 81-2188. In that Motion, the Blackfeet Indian Nation chronicled with care the total failure of the Department of Justice properly to represent the Blackfeet Indian Nation in the *Adsit* cases. Particularly shocking to my Tribe is the fact that you would, in clear violation of the law, all as reviewed in the Motion, seek to force upon the Blackfeet Indian Nation the jurisdiction of the State of Montana over the Tribe's Reserved Rights to the use of water. Presented there is a most shocking disregard of professional responsibility which my Tribe will not tolerate.

In the April 14, 1983 conversation between the Tribe's Counsel and Mr. Claiborne of your staff, the request was made that until the Supreme Court has acted in the *Adsit* cases, the Department of Justice refrain from seeking to have soil and land classification studies conducted under its direction allegedly to be used in the Adsit cases. Mr. Claiborne declared that the Solicitor General would not intrude upon the decision made by the Land and Natural Resources Division of the Department of Justice, which is demanding that the new studies be undertaken. It was suggested to Mr. Claiborne that there resided with the Solicitor General the obligation to maintain the status quo respecting the issues presented by the Blackfeet Indian Nation to the Supreme Court and that there should be avoided the confrontation between the Blackfeet Indian Tribe and the contractor who has, at the behest of the Department of Justice, agreed to enter upon our Reservation to conduct studies which my Tribe will not tolerate.

I am transmitting to you with this letter a copy of a communication dated February 11, 1983 to the Acting Area Director, Bureau of Indian Affairs, Billings Area Office. In the second paragraph of my letter, the Bureau of Indian Affairs is fully advised that my Tribe has accepted soil surveys that have been completed and rejects proposals that new studies be made. In the final sentence of that second paragraph, this statement is made, "Contractors will not be allowed on the Reservation to conduct any such studies." My Tribe is resolute in that decision and, while seeking to avoid a confrontation, respecting the new studies proposed by the Department of Justice, you may rest assured that if the Department of Justice precipitates such a confrontation, the responsibility resides with you, as the principal official in the Department of Justice directly and immediately involved in the Adsit cases.

Because I desire peace and not conflict for my Tribe, I renew the request made to Mr. Claiborne that you direct that the status quo in the Adsit cases be maintained and that the contractors employed at the request of the Department of Justice refrain from attempting to enter upon the Blackfeet Indian Reservation to conduct studies concerning which my Tribe is unalterably opposed. In regard to that opposition, I refer to the Resolutions dated November 3, 1982, Nos. 56-83 and 59-83, in which the Governing Body of the Blackfeet Indian Tribe rejects representation by the Department of Justice in the Adsit cases and specifically closes the Reservation to any further studies of the Tribe's soils.

I truly hope that you have sufficient wisdom not to violate the Tribe's wishes in these all important matters.

Sincerely,

Earl Old Person
Chairman
The Blackfeet Tribe

enclosure

THE BLACKFEET TRIBE
OF THE BLACKFEET INDIAN NATION
P. O. Box 850
BROWNING, MONTANA 59417

EXECUTIVE COMMITTEE
EARL OLD PERSON, CHAIRMAN
ARCHIE ST. GODDARD, VICE-CHAIRMAN
LEE WILSON, SECRETARY
ELOUISE C. COBELL, TREASURER

TRIBAL COUNCIL
EARL OLD PERSON
ARCHIE ST. GODDARD
LEE WILSON
LANE KENNEDY
DAN BOGGS
ROBERT "SMOKEY" DOORE
JOHN MURRAY
GEORGE KICKING WOMAN

June 21, 1983

Mr. Richard Whitesell
Area Director
Billings Area Office
316 North 26th St.
Billings, Montana 59101

Dear Mr. Whitesell:

This is in reply to your June 10, 1983 letter wherein you request a meeting with the Blackfeet Tribal Business Council regarding our "disagreement concerning the need for a land classification study".

Attached here for your review are copies of the Resolutions the Tribe adopted based on the best information available. The Morrison-Maierle studies are evidentiary in character and are what we have determined to be adequate for litigation. The Resolutions are: 59-83, 56-83, 273-83 and 368-83.

The entire matter is before the Supreme Court, therefore there is no need for any duplicate studies nor is there a need for a meeting between us respecting those issues.

Sincerely,

Earl Old Person, Chairman
Blackfeet Tribal Business Council

EOP/cw

Attachments (4)

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
BILLINGS AREA OFFICE
316 NORTH 26TH ST.
BILLINGS, MONTANA 59101

JUN 14 1983

IN REPLY REFER TO:
Rights Protection
PPM 15-1b

Earl Old Person

JUN 10 1983

Through Superintendent, Blackfeet Agency

RECEIVED
JUN 13 1983
BLACKFEET AGENCY
BROWNING, MONTANA

Earl Old Person, Chairman
Blackfeet Tribal Business Council
Blackfeet Tribe
Browning, Montana

Dear Mr. Old Person:

It is obvious that we are in disagreement concerning the need for a land classification to support Indian reserved water rights claims on the Blackfeet Indian Reservation. Based on the best information available to us, we believe that this additional study is needed to successfully support your reserved water rights claims. We further believe that we have no legal choice but to secure the information in support of water rights litigation.

In our four previous meetings the council has not had the opportunity to hear our side of the question, nor do we feel we have been allowed to present our side. Therefore, I propose a meeting limited to the Tribal Business Council, the Superintendent and the Area Director. This meeting could be held in Billings, Browning or any other convenient location.

Please let me know if this is agreeable to you and some alternative dates that we could consider.

Sincerely,

Richard Whitesell
Area Director

cc/All
BTBC
members

Noted and Transmitted

Superintendent, Blackfeet Agency 6/13/83

Senator MELCHER. Now we would like to have, appearing as a panel, the witnesses for the Department of the Interior and the Department of Justice. This would be John Fritz, Deputy Assistant Secretary for Indian Affairs, Department of the Interior; Sidney Mills, Director, Office of Trust Responsibilities, Department of the Interior, and Carol Dinkins, Assistant Attorney General for the Department of Justice, Land and Natural Resources.

Mr. Fritz, we have your testimony and we will make it a part of the record. It is just a two page testimony dealing with legal points and points of evidence.

We are more concerned about the procedure that was followed in, first of all, preparing the request for proposal in 1981. What happened to it in 1981 and to the subsequent request for proposal in 1982? What were the series of events that led up to this contract with CH2M, Inc., particularly in light of the fact that the tribe voiced some concern and I voiced some concern in February of this year.

The committee staff informed you of the committee's concern over this contract prior to your testimony up here on February 23. After that testimony, we understand the moneys were released on February 25. Why has this gone on so long?

STATEMENT OF JOHN FRITZ, DEPUTY ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY SIDNEY MILLS, DIRECTOR, OFFICE OF TRUST RESPONSIBILITIES, DEPARTMENT OF THE INTERIOR; PHILIP CORKE, ACTING CHIEF, WATER AND LAND RESOURCES DIVISION, OFFICE OF TRUST RESPONSIBILITIES, DEPARTMENT OF THE INTERIOR; AND MATT COLE, ASSISTANT AREA DIRECTOR FOR TRUST RESPONSIBILITIES, BILLINGS AREA OFFICE, BILLINGS, MONT.

Mr. FRITZ. Mr. Chairman, also with me at the table is Mr. Matt Cole from the Billings Area Office. Mr. Cole is the Assistant Area Director for Trust Responsibilities and, as a matter of fact, of the three of us he is probably the one who has the most comprehensive knowledge of the matter at hand because neither Mr. Mills nor I were in our current positions in 1981.

Senator MELCHER. Let us start then, with 1981.

Mr. COLE. At that time, we had a request for proposal prepared, which not only included the Blackfeet Reservation, but other reservations in that area. At that point, we looked at those contracts and decided, with the concurrence of our Solicitor's Office and the Department of Justice, that we would not advertise and we canceled the RFP.

Then, the following year, on August 11, 1982, we advertised in The Daily Commerce just for the Blackfeet contract. The other contracts were not advertised at that time.

The closing date for the bidders to submit their proposals was September 13, 1982. From that point we went through the regular procedures. There were 11 proposals which were submitted. We then formed a review team consisting of people from the Department of Justice, Interior, the BIA agency at Blackfeet, and two people from our area office. We also submitted a letter inviting the tribal council people, or somebody from their staff, to sit in on the review of the contracts.

The only person who was there was Mr. Gervais from the BIA agency at Blackfeet, who was a tribal member. These proposals were then reviewed technically and from those, three were selected as the best. After interviewing each bidder, the review team then requested that they submit their best and final offer by October 8.

At this first point we did not look at finances in any way, but only reviewed the technical capabilities of those people who had presented bids. We did not approve the contract until January 31, 1983. During that period we did ask for and did receive two extensions from the people who were the final proposers of bids.

The reason for making the final appproval on January 31 was that it was the end of the second requested extension. That was the time that we did award the contract to CH2M Hill.

Senator **Melcher**. Is Phil Corke here?

Mr. **Corke**. Right here, sir.

Senator **Melcher**. Would you come up to the table, please? Would you state, for the record, what your position is in the Department of the Interior?

Mr. **Corke**. I am the Acting Chief of the Water and Land Resources Division in the Office of Trust.

Senator **Melcher**. All right, Matt. What motivated you to ask for a request for a proposal?

Mr. **Cole**. This goes back to not only the first one, but also the second one, Senator, that we reviewed. Prior to issuing a request for proposal—if I may look at my notes here for just a second—we first review the documents that we presently have and by "documents", I am referring to the former or previous work that had been done on the Blackfeet Reservation. I think that has been gone over a number of times. These documents include the various phase 1 water studies, phase 2 uses and needs of Morrison-Maierle and their supplemental, or soils inventory work.

After we reveiwed these documents, and consulted with the Department of Justice and the Solicitor's Office, we, at that time, determined that the information that we had was not adequate to support an Indian water claim in litigation.

Senator **Melcher**. Does this originate with you, or do you get word from Washington?

Mr. **Cole**. We work with Washington, yes.

In this case, it was the area office, in conjunction with the Solicitor's Office, the Department of Justice, and the BIA central office, which put together the RFP.

Senator **Melcher**. Do they not tell you that they have some money they are going to put out?

Mr. **Cole**. No; usually it is the other way around. We are asking for money from them, it seems like.

Senator **Melcher**. Do you ever spend any money before they say you can?

Mr. **Cole**. I would not, in any way, plan to spend money without having a resolution, a written resolution in most cases, from Mr. Fritz himself. It is usually in the form of a telegram or other written authorization from Mr. Fritz.

Senator **MELCHER**. All right, Mr. Fritz and Mr. Corke, we are going to get back to Washington because that is what we are concerned about.

Did you ever send this letter, which I wrote to the Assistant Secretary, out to Billings?

Mr. **FRITZ**. I am sorry, sir.

Senator **MELCHER**. The tribe wrote through channels that they were concerned about these requests for proposals as being duplicative and contrary to their wishes. They sent that, and I assume those channels work and it got to Washington. Did you see it?

Mr. **FRITZ**. If you are talking about one from last summer?

Senator **MELCHER**. 1981 to begin with.

Mr. **FRITZ**. I was not with the Department of the Interior in 1981.

Senator **MELCHER**. Well, when did you begin?

Mr. **FRITZ**. The start of 1982. Actually, I was only there for a couple of days in 1981.

Senator **MELCHER**. Let us go to 1982, then. When they write a letter like that, do you see it?

Mr. **FRITZ**. It depends. If it were received by a division, for example, it would be handled at the division level.

Senator **MELCHER**. What is a division?

Mr. **FRITZ**. A suboffice in the Office of Trust Responsibilities. Mr. Corke and whoever the director of that office was at that particular moment, would have probably handled it and there would have been a resolution letter. They would have brought it before me with pros and cons, as well as options on responding to it and then I would have seen it, sir. I, frankly, cannot remember.

Senator **MELCHER**. Well, at some point before you OK'ed the money, I assume you reviewed the file?

Mr. **FRITZ**. Yes, sir, it is brought forward with a recommendation from the division, in other words, the Office of Trust Responsibilities in this instance.

Senator **MELCHER**. So the request for proposal that was prepared in 1982, presumably, also had the request for proposal in the file for 1981.

Mr. **FRITZ**. The big request would never come forward, sir.

Senator **MELCHER**. Pardon me?

Mr. **FRITZ**. I would never see one of the major technical requests. Those things would just be too bulky to send through.

Senator **MELCHER**. Well, is it your testimony that you are not aware that the tribe contended that this was duplicative?

Mr. **FRITZ**. I became aware of it in the late fall but I honestly cannot remember exactly when.

Senator **MELCHER**. In the late fall?

Mr. **FRITZ**. Yes.

Senator **MELCHER**. Before the contract was let.

Mr. Corke, were you aware of this memo from one of the Department officials, an Acting Director of the Office of Trust Responsibilities or a memo from one of the Department officials to the Acting Director of the Office of Trust Responsibilities, which I quoted from, "It appears that the Department of Justice is concerned," et cetera. Were you aware of that?

Mr. **CORKE**. Yes, I was.

Senator **MELCHER**. Did you make notations on this proposal of CH2M Hill, in the margin, that parts were duplicative?

Mr. CORKE. Yes, on my copy of the RFP that was advertised last August.

Senator MELCHER. Yes.

Mr. CORKE. When I received it I——

Senator MELCHER. Now this is on the RFP.

Mr. CORKE. Yes.

Senator MELCHER. Request for proposal.

Mr. CORKE. Request for proposal of August 1982.

Senator MELCHER. When you received it, what did you do?

Mr. CORKE. Knowing the work that had previously been done, I went down through the work items that were shown and in the margin wrote down where they had already been previously done by Morrison-Maierle.

Senator MELCHER. How much of it was duplicative that you noted?

Mr. CORKE. A substantial part, especially in the first phase or the first section, which covered the soils work.

Senator MELCHER. Was that most of it, half of it, or all of it?

Mr. CORKE. Over half, I would say.

Senator MELCHER. Who got it after you made those notations?

Mr. CORKE. I do not know.

Senator MELCHER. You do not know?

Mr. CORKE. I do not know who got my notations. You do mean my copy?

Senator MELCHER. Yes.

Mr. CORKE. I do not know.

Mr. MELCHER. Did you inform anybody in the Department of your concern?

Mr. CORKE. Oh, yes.

Senator MELCHER. Who did you inform?

Mr. CORKE. I informed both Mr. Mills and Mr. Fritz of my concerns as a staff person. Generally, I make my recommendations and comments to them and they in turn make the decision.

Senator MELCHER. Why did you go ahead then, Mr. Fritz?

Mr. FRITZ. I have to take into account a number of recommendations and I am just trying to think when Mr. Corke would have informed me, because that would have been at the point, I think, that I would have known that there was a dispute.

Senator MELCHER. You are in the middle, Mr. Mills. What do you say to this?

Mr. MILLS. Senator, I am not aware that Mr. Corke specifically had told me, but it was around that time that there were concerns from the tribe that some of the work maybe was duplicative.

Senator MELCHER. Well, we are beyond the tribe now. I really assume you knew all about the tribe's objection. You knew all about the letters that I wrote, too.

Mr. MILLS. Right.

Senator MELCHER. We are beyond that stage. Now we are right in your own shop. Where is Mr. Corke's office compared to yours; down the hall or next door?

Mr. MILLS. No; he is right in my shop just down the hall, sir.

Senator MELCHER. Just down the hall. So you knew about it then?

Mr. MILLS. Yes, sir. I knew that there were some concerns there.

Senator MELCHER. Concerns? Did you know he just went right through it and wrote in the margin, "this duplicates; it has been done before"?

Mr. MILLS. Yes, sir, but there were also the technical people in the Billings Office who indicated that some of this was not duplicative. The Justice Department also felt that they needed more information, that this was not duplicative.

Senator MELCHER. Oh, now, we do not call in lawyers to tell us whether a soil study duplicates something or not. We call in people with commonsense. Not that lawyers do not have commonsense, but when you call in the lawyers it is a legal question then, is it not?

Are you telling me that your commonsense had to be overridden by the legal opinions of what these lawyers thought they might or might not need in some far-down-the-road litigation?

Mr. MILLS. No, sir; it was my opinion that the attorneys had checked with the technical people to get their information.

Senator MELCHER. Well, you know, we can go around and around about this, but it is your responsibility, is it not, and then Mr. Fritz'?

Mr. MILLS. Yes, sir.

Senator MELCHER. We never mentioned the Assistant Secretary yet. Does he play in this yet, Mr. Fritz? When does he start to play in this?

Mr. FRITZ. Actually he does not.

Senator MELCHER. He does not? So, we are going to leave Smith off the hook?

Mr. FRITZ. Yes, sir.

Senator MELCHER. Well, whose department is it?

Mr. FRITZ. Secretary Watt's.

Senator MELCHER. And we are not going to leave him off the hook.

Mr. FRITZ. He was not involved in this to my knowledge.

Senator MELCHER. He is involved with everything you do, is he not?

Mr. FRITZ. Well, yes.

Senator MELCHER. He claims he is.

Mr. FRITZ. It is delegated to Mr. Smith and then on to myself, sir.

Senator MELCHER. Now when did you get my letter to Secretary Watt?

Mr. FRITZ. Is that the one from this spring?

Senator MELCHER. Yes, March 4. It was hand-delivered.

Mr. FRITZ. It came down to us and it went to the division and I suppose I saw it in the middle of March.

Senator MELCHER. Do you think Secretary Watt saw it first?

Mr. FRITZ. I do not have any idea how their mail room operates. I often do not see letters until they have been through a staff function and I presume maybe his operates the same way. I do not know.

Senator MELCHER. Well, I wonder why a March 4 letter takes until April 8 to answer? I am told it was March 3. That is one day worse. Why it takes him until April 8 to answer and has to be jacked-up in between?

Mr. FRITZ. As a matter of fact he just jacked-up all of us this morning on responding to the Congress and the Senate. I cannot respond to why it takes that long, sir.

Senator MELCHER. I want to point out to you, Mr. Fritz and Mr. Mills, that there is a pretty long history involved here of letters to the Department saying that we think there is something haywire, first, because if this duplicates something that has been done, why should the money be spent. And, second, it was just a matter of expressing concern that it might duplicate something. There were two letters; one in 1981 and one in 1982. The letter of March 3 or 4 in 1983, was really for the purpose of advising Secretary Watt that something was happening in the Department of the Interior that did not make any sense at all as far as we could determine. That was after this committee staff had met. Were you not present? Who was present at the February 22 meeting with the staff of this committee?

Mr. FRITZ. I was there and Mr. Mills was there.

Senator MELCHER. Both of you were there?

Mr. FRITZ. Yes; I did not see the questions raised in the letters.

Senator MELCHER. Who represented the Department? Who represented your office at that February 22 meeting with the staff of this committee?

Mr. MILLS. Senator, it is possible from my office it was Ms. Crosby.

Senator MELCHER. Ms. Crosby.

Mr. FRITZ. The day before the hearings, I am sorry; no, I was not at that particular meeting.

Senator MELCHER. Ms. Crosby met, then, with the staff of this committee and the staff of the House committee on February 22, the day before you testified at this committee's hearings.

Mr. FRITZ. I do not know. I am sorry.

Mr. MILLS. She was representing my office, Senator. So, if that meeting was on that date, she was there.

Senator MELCHER. Well, then, on the next day, we conscientiously tried to allow you to straighten this out by meeting with whomever you sent to that meeting. I guess it was Ms. Crosby. I was not there; it was just staff. And, the general counsel of this committee, conscientiously, on behalf of the committee, pointed out to her that there would probably be questions concerning this contract that the committee would want answered.

On the next day, February 23, you sent an authorization, Mr. Fritz, to the area office in Billings saying, "obligate $500,000 for the contract." I have a copy of it here. It originates with S. M. Crosby, Trust Responsibilities, Mr. Mills. It is signed for you, Mr. Fritz. So the very thing that we quietly and conscientiously warned you not to do was done the next day by the person that you said represented the Office of Trust Responsibilities, at the February 22 meeting.

Mr. MILLS. Senator, if I may for a minute, the contract was already let. When the contract was let the moneys were obligated.

Senator MELCHER. We have reviewed the contract, and I am sure you have too, Mr. Mills. Our understanding is, that contract does not require you to spend any of that money if you find it is not in the public interest.

Mr. MILLS. Well, we did enter into a contract. Our field office entered into a contract. They needed some dollars to cover their contract. On a temporary basis they would cover that with their own funds.

They had requested funds from the Central Office. That these funds went out on the 23d or 25th, Senator, was strictly routine within our shop. It was not intentionally timed to occur the day after a hearing. That was never——

Senator MELCHER. This is dated the day of the hearing, February 23, 1983; the day after the meeting with the staff. You were told by the staff that you were going to have some questions about the propriety of this contract, and that the committee was concerned, but the very next day S. M. Crosby, of the Office of Trust Responsibilities, who I assume was the person you said represented you and Mr. Fritz at this meeting, was the one that originated it and signed it for Mr. Fritz. So there were not any vouchers there, or was there?

Mr. MILLS. I do not think so; not at that time.

Senator MELCHER. There was not, because I inquired of Mr. Cole if there were any vouchers present.

Now, let us get back to this contract because I think the word "contract" implies an obligation to pay. Well, we have reviewed that contract and we do not think that it obligates the Department of the Interior to spend these tax dollars under any circumstances if the Department determines that it is contrary to the pubic interest.

Mr. MILLS. That is true, sir.

Senator MELCHER. Apparently duplicating a study in part, a large part, or mostly, and I am not going to determine which of those it is, is not a criteria to determine whether it is in the public interest or not. You certainly are not going to tell us that, are you?

Mr. MILLS. No, sir.

Senator MELCHER. Well, why do you not just tell us that you ignored letters, you ignored the telephone calls, you ignored direct consultation through Ms. Crosby, who works in your shop and represented you at that staff meeting. There is no worthwhile explanation for it, is there?

Mr. MILLS. Well, I think there is, sir. These were not ignored. It is routine when someone issues a contract that it is covered by funds. The contract definitely can be canceled at any time and the funds can be stopped at any time. But it is routine procedure that a contract is covered at the time of issuance.

Senator MELCHER. Subsequent to this time you may or may not define it as routine, but I have never found this to happen when I felt there was an urgent need for the Department of the Interior to issue some funds. Apparently when there was not any urgent need to cover an outstanding contract, you provide a half million dollars in funds and there have only been $30,000 estimated expenditures and an amount of $726 has been submitted in vouchers as of this date. Matt, is there any more?

Mr. COLE. As to the $30,000, I do not believe that amount has come to us in an actual voucher yet. I believe those are estimates by CH2M Hill of expenditures they have made up to now. I am not sure whether there are more right now, Senator.

Senator MELCHER. Well, anyway, a full month after this half a million was obligated, authorized, or whatever term you want to use to clear the expenditure from the Department of the Interior here in Washington to the area office, there were $30,000 and some odd hundred estimated to be obligated. I do not know whether that was obligated during that month or prior to that month. It is not known to us, but we are going to assume that it probably was obligated since the $500,000 was sent out there.

Why, Mr. Fritz, did you obligate $350,000 out of the water resources fund, contrary to law?

Mr. **Fritz**. The $350,000, is that from last—I am not sure where that came from.

Senator **Melcher**. It came out of the Water Resources Fund.

Mr. **Mills**. The $500,000, Senator?

Senator **Melcher**. The $350,000.

Mr. **Mills**. I am not aware of any $350,000. I am not sure what you are referring to, sir. Mr. Cole, I think, has the answer to that, Senator.

Senator **Melcher**. Well, on January 31 the Department obligated $350.000 out of the water resources program as funds to cover this obligation under the terms of the contract.

Mr. **Cole**. When we received instructions to award the contract on January 31, there had to be a contract awarded and it was at that time, Senator, that we did put the figure of $350,000 from the 3800–5490 account, which is an account which can be used for litigation or for negotiation, the general waters resource figure. At the point that we were given the instructions that we did have $500.000 from the water litigation funds, I believe on March 9, we then decreased that contract by $350,000 and put the total water litigation funds into the contract.

Senator **Melcher**. The water resources fund is for a specific purpose and it is not for litigation. In preparing the budget justification Secretary Watt stated the purpose of the water resources program fund and the rights protection program. If this information, as you imply, Mr. Fritz, is to be for purpose of litigation, based on Secretary Watt's statement, the rights protection program fund would be the legal fund to draw this on. The Department made that transfer of $500,000 from the correct fund, the legal fund, to replace $350,000 from the water resource program, the illegal fund.

What was all of the urgency about this? You had two requests for proposals. It just baffles me, and I think others of this committee, why there was any urgency for this in view of the fact that the tribe had passed a resolution saying they objected to it and because they objected to it they were not going to allow access.

Now, Mr. Twitchell of CH2M Hill made it very clear that they are not miracle makers. If they are going to take soil studies they are going to have to get on the reservation and do the soil studies. One of the other things that concerned us was that in view of all of this, we do not like to cast any aspersions on CH2M Hill, but we note that David Harrison, former CH2M Hill consultant, is now employed by the Bureau of Indian Affairs. Now what is his capacity down there?

Mr. **Mills**. Mr. Harrison, Senator, works in the Office of Trust Responsibilities. He is a temporary employee right now. He works on special projects.

Senator **Melcher**. Like water studies, soil studies?

Mr. **Mills**. At this point, since he has been there, I do not believe he has worked on any water studies.

Senator **Melcher**. He came from CH2M Hill, is that right?

Mr. **Mills**. I was not aware that he was with CH2M Hill.

Senator **Melcher**. Never worked for them?

Mr. **Mills**. I do not know that, sir.

Senator **Melcher**. Mr. Corke, you work with Mr. Harrison?

Mr. **Corke**. Yes I do, and did when he was there before. Yes.

Senator **Melcher**. Was he involved in the Klamath Fishery study?

Mr. **Corke**. His name was on the original tender from the firm.

Senator MELCHER. From CH2M Hill?

Mr. CORKE. Yes, he was shown by CH2M Hill as being one of the staff that they would use on the study if they got the contract.

Senator MELCHER. When was that?

Mr. CORKE. Last summer.

Senator MELCHER. That, that proposal was made?

Mr. CORKE. Yes; it was during 1982, spring and summer.

Senator MELCHER. Was the contract let to CH2M Hill?

Mr. CORKE. It originally was tendered as a sole-source proposition. That was discontinued. Then BIA did go out on the street with a full-blown RFP and solicited proposals from other firms also, but CH2M Hill did ultimately end up with the contract.

Senator MELCHER. When did they get it?

Mr. CORKE. I would say August or September of last year.

Senator MELCHER. Who was Mr. Harrison employed by then?

Mr. CORKE. At that time he was not in Federal service. He was on the outside working wherever he could get employment as a consultant.

Senator MELCHER. Was he still one of the consultants that CH2M Hill proposed to use on that study?

Mr. CORKE. His name and Mr. Waldrip's name had both been removed from the staff listing on the final proposal of the firm.

Senator MELCHER. When did he come to work for the BIA this time around. Has he worked for the BIA before?

Mr. CORKE. Yes; he had worked for the BIA several years before he left.

Senator MELCHER. What capacity was he in then?

Mr. CORKE. A number of capacities, including Acting Director of Trust, the position that Mr. Mills now has.

Senator MELCHER. The job that Mr. Mills has?

Mr. CORKE. Yes.

Senator MELCHER. So he left the BIA and went in consulting, was involved with CH2M Hill on a proposal, his name was then removed from the proposal when the contract was let. Then he came to work for the BIA again. What date was that?

Mr. CORKE. He came back last August or September.

Senator MELCHER. At the time the contract was let?

Mr. CORKE. About that time. Yes, sir.

Senator MELCHER. Mr. Mills, does this not raise some questions in your mind?

Mr. MILLS. Senator, I had no idea Mr. Harrison was working with maybe CH2M Hill. If he was, we hired him in September or October—I do not know—the fall of the year.

Senator MELCHER. Well, those are all matters of record and you can supply them.

[Subsequent to the hearing the following information was received for the record:]

David Harrison's current employment began on August 16, 1982.

Mr. FRITZ. Mr. Chairman.

Senator MELCHER. Yes.

Mr. FRITZ. One of the situations that we face constantly is the movement in and out of the Bureau of Indian Affairs of the limited number of persons who are within the universe of Indian professionals.

I do not know what Mr. Harrison's role was in terms of the earlier contract, but I am sure it was something to do with the realm, or at least the area of trust, in which he is one of the recognized authorities in the Nation. As a matter of fact, Public Law 93-638 allows people to float in and out in those positions.

I do not know that that is a justification but I do know that it occurs. It occurs at the Assistant Secretary's level and it occurs at the Commissioner's level and throughout the organization. There is just a limited number of professionals.

Senator MELCHER. Well, there is a Federal law, however, that does not exclude anybody on this question, is there not?

Mr. FRITZ. There is, if they have a direct responsibility, for example, as I understand it. I am sorry, I do not have the law right at the tip of my tongue, sir. But, as I understand it the Ethics in Government Act has direct application except with respect to people who do not have a direct impact upon a given subject matter, either in the private sector, or as a decisionmaker in the public sector going back in their various roles. But we can get that information for you for the record, sir, because it was studied in detail before our arrival.

Senator MELCHER. Well, obviously if David Harrison was Acting Director of the Trust Responsibility in the BIA, he is probably going to work again in Trust Responsibility.

Did he, at any time, Mr. Mills, discuss either one of these CH2M Hill contracts with you?

Mr. MILLS. I do not recall, Senator. I use Mr. Harrison from time to time on a lot of issues. He has a lot of knowledge of what has happened in the past in that shop, but I do not think he has been involved specifically on this contract with CH2M Hill.

Senator MELCHER. Either one?

Mr. MILLS. Either one, that I am aware of.

Senator MELCHER. Well, should he not do much more than that though? Should he not exclude himself from any involvement whatsoever?

Mr. MILLS. Yes, sir, he should.

Senator MELCHER. He should do that overtly and deliberately, should he not?

Mr. MILLS. That has not come up. He has not been associated with them that I am aware of. If that would happen, I am sure he would do that.

Senator MELCHER. You just heard Mr. Corke say that he was on the proposal for the Klamath Fishery study in CH2M Hill. So at least it was proposed that he be hired as a consultant. In that proposal, Mr. Corke says, he was removed. Is that right, Mr. Corke, his name was removed and the other gentleman's name was removed?

Mr. CORKE. Yes; on their final proposal their names did not appear as staff members of the firm.

Senator MELCHER. Neither one?

Mr. CORKE. Neither one.

Senator MELCHER. Repeat the name of the other individual.

Mr. CORKE. Waldrip was his last name, W-a-l-d-r-i-p.

Senator MELCHER. Waldrip was a former employee of the Bureau of Indian Affairs, was he not?

Mr. CORKE. Yes; he was former Assistant Area Director in Portland.

Senator MELCHER. Now, again, all that information on whether or not he followed in this revolving door from the BIA to consultant on the contract, the date he left as an employee of the BIA, when a proposal was made or any contract let, should be available and you can submit that also for the record.

[Subsequent to the hearing the following information was received for the record:]

Doyce L. Waldrip retired from the Bureau of Indian Affair June 14, 1980. He was subsequently employed on a temporary basis in the Office of the Assistant Secretary for Indian Affairs.

We have requested the return of his personnel file from the Federal Records Center and as soon as we receive it we shall provide the exact dates of his employment in the Office of the Assistant Secretary.

Senator MELCHER. All three of you can collaborate on that.

We are also concerned, and when I say we I mean the committee is concerned, about a former Deputy Assistant Secretary for Indian Affairs, Roy Sampsel and what role, if any, he played in this particular CH2M Hill contract.

It is my recollection that he resigned as Deputy Assistant Secretary for Indian Affairs last fall, approximately October or November.

Mr. FRITZ. I think in the latter part of November.

Senator MELCHER. The latter part of November.

Did he contact you, Mr. Fritz, about the time this contract was let?

Mr. FRITZ. No, sir.

Senator MELCHER. Was he in you office?

Mr. FRITZ. He could have been in the office.

Senator MELCHER. He is in and out of your office, is he not?

Mr. FRITZ. No.

Senator MELCHER. He is not in and out?

Mr. FRITZ. No, sir.

Senator MELCHER. Has he been in your office since he left?

Mr. FRITZ. As a matter of fact, he was there last week.

Senator MELCHER. Was he there in January?

Mr. FRITZ. He was in and trying to get some of his paperwork cleared up to get out of the—he had some paperwork that had to be cleared up for his personnel files.

Senator MELCHER. Well, would he come into your office to do that?

Mr. FRITZ. He just stopped by to say hello.

Senator MELCHER. He is in the consulting business now, privately, independently, or how?

Mr. FRITZ. Pardon?

Senator MELCHER. What kind of business is he in now?

Mr. FRITZ. From what I understand he is in the consulting business.

Senator MELCHER. Here?

Mr. FRITZ. Yes, sir.

Senator MELCHER. In Washington. Did he ever contact you or anyone in your office in regard to this CH2M Hill contract?

Mr. FRITZ. He did not contact me and, to my knowledge, he never contacted anyone at the staff level.

Senator MELCHER. Mr. Mills.

Mr. **Mills**. No, sir, he has not contacted me.

Senator **Melcher**. Has he been in your office?

Mr. **Mills**. He has stopped by to say hello once since he left.

Senator **Melcher**. When was that?

Mr. **Mills**. That would be a couple of months ago.

Senator **Melcher**. In January?

Mr. **Mills**. It could have been in January.

Senator **Melcher**. Mr. Corke?

Mr. **Corke**. I have not seen him since he left.

Senator **Melcher**. He just says hello to Mills and Fritz?

Mr. **Corke**. I guess that is right.

Senator **Melcher**. Maybe he never knew you.

Mr. **Corke**. He knew me.

Senator **Melcher**. He knew you.

Well, because this deal smells, and I use that word advisedly, we want to know how much we should expect. Any more surprises we might have like I think we have had, first of all, with the contract being let on January 31 after we were advised by a letter dated January 20 that there was going to be some consultation with the tribe: Who signed that letter?

Mr. **Fritz**. The January 20 letter?

Senator **Melcher**. We have a copy of that letter. Let us see who signed it.

We got a letter January 20 of this year saying that there is going to be some consultation with the tribe prior to the time this contract would be let. Was that in November, Sid? I said January.

Mr. **Mills**. I think there was a letter, Senator, but I am not sure that I signed it, either in October or November.

Senator **Melcher**. Was there some consultation after you sent the letter and who consulted?

Mr. **Mills**. I believe I met with the tribe once in Billings.

Senator **Melcher**. You met with the tribe?

Mr. **Mills**. With the chairman and the water committee and their attorney, and our Billings area people. Justice was there.

Senator **Melcher**. All right. Your letter, Sid, says:

> No contract has been awarded for additional soil studies. They are under consideration currently here in the Department, and we expect a final decision by January 20.

That is where I get the 20th.

> And which will afford the opportunity to explore these matters in depth with Chairman Old Person prior to that date.

And so, in the fall you did meet with him.

Mr. **Mills**. Yes, sir.

Senator **Melcher**. I assume there was nothing changed after that meeting. The tribe says we have a resolution that says we do not want you to do it and will not allow access.

Mr. **Fritz**. Mr. Chairman?

Senator **Melcher**. Yes, Mr. Fritz.

Mr **Fritz**. I am sorry. I did not mean to interrupt you.

Senator **Melcher**. No; that is all right.

Mr. **Fritz**. During December 1982 and January 1983, we had close and daily contact with the U.S. Department of Justice and also with our field office in Billings.

We had to make a decision at that point as to what were our responsibilities arising out of the trust relationship. So I listen to your comments with a great deal of learning, listening to the discussion about personalities, but also facing the reality that I have to face as the senior person responsible for the divisions and their jobs that they have to perform.

It becomes very difficult at points to ascertain all of the information related to a particular issue because by the time it gets to me, a substantial portion of the background information has sometimes been dropped off. So we have to turn to the Department of Justice and our Solicitor's Office for opinions. Our seeking those opinions was really fostered by a dispute of a technical nature between our area office, located in Billings, and our central office, located in Mr. Corke's office, as to the quality of the former lands classification study.

Candidly, General Dinkins and her staff advised us, as did our own solicitors, that we did not have an adequate data base to affirmatively defend the interest of our beneficiaries in litigation. That was their legal conclusion. So, as a result, that is how we got down to the issuance of the contract in January 1983.

Senator MELCHER. Well, you know, you cannot get on the land.

Mr. FRITZ. I think that arose after the fact, sir. I think that resolution—was it before, Matt?

Senator MELCHER. Well, it was in November 1982.

Mr. FRITZ. The resolution was? But at some point we have to walk that fine line, Mr. Chairman, between where do our responsibilities lie and——

Senator MELCHER. Well, we are going to get to the Justice Department in a little bit and we have an expert witness here to speak for Justice.

But this committee is not impressed with any argument that says because there might be a lawsuit.

Mr. FRITZ. I am sorry?

Senator MELCHER. There might be a need. I had better restate that for the record. There might be need in a future lawsuit for an expert witness. It goes beyond all commonsense to say that we are going to have another study that repeats what has already been done and we are going to pay money for that study and that subsequently, somewhere down the road, out of that study there is going to be a need by the Justice Department for an expert witness, which we do not have right now.

We are going to ignore, we being the Department of the Interior, Secretary Watt and all of you, are going to ignore a tribal resolution, which I suspect can be legally enforced by both the Department of the Interior Solicitor and the Justice Department attorneys, if they are called upon, to prevent access to the tribe's land.

We cannot be impressed by saying that, in order to get at this witness some time in the future, we are going to have to do soil samples on the Blackfeet Reservation now with a new contract, even though it duplicates something we already could get, when we know we cannot get on the land to make the soils test.

Mr. FRITZ. I do not mean to belabor the point, sir, but our staff at the area office, Mr. Cole's immediate staff, felt that it would not duplicate it. I had to take that into consideration. They are the people that are closest to the——

Senator MELCHER. You know, I just think the world of Matt Cole, but when you get up into the Trust Responsibilities staff level here in Washington, I know where I am, and who is going to make the decision. That staff level here in Trust Responsibilities said that this duplicates that study.

I know also that Trust Responsibilities has got to make a recommendation to you for release of some funds. I know that you make a decision to release those funds on the basis of what Secretary Watt tells Congress is the justification for his budget and for what he thinks is needed to run the Department.

So, knowing all of that, I know who is responsible. It is Mr. Watt, then it is you, then it is Mr. Mills, and finally the area office.

The area office is not going to get this money released unless Mr. Watt says it is all right through you.

Mr. FRITZ. Actually it does not go any higher than me. The person who has ultimate responsibility is——

Senator MELCHER. Well, you cannot shield Watt no matter what you do.

Mr. FRITZ. You know, from my standpoint, I pick up the phone and call.

Senator MELCHER. You know, it is just like me saying that I am not responsible for what people do in my office. Now, I get about as far with that argument as the back part of this chair. I do not make that argument and Mr. Watt is not going to make that argument and he knows he is responsible. He knows that whatever the fault, it is his.

I would not be so blatant about it except that I did write to him. I had that letter hand-delivered on March 3 or 4 and he had plenty of time to straighten this out before this hearing date. It is in such a mess that it is hard to straighten out. There is no use in me belaboring it any more either, Mr. Fritz.

Just to bear this out, you are well aware of the letter, I suspect, that you prepared for Secretary Watt, or somebody prepared for him. I think you should be aware of the letter that says—when he did answer me on April 8—there would not be any more than $100,000 of that money spent until this is all cleared up.

So we have changed it from the $500,000 that went out and then he changed it by his letter to $100,000.

Mr. FRITZ. Actually that was changed by me, sir, after our meeting in your office.

Senator MELCHER. Sure, after we met?

Mr. FRITZ. Yes, sir.

Senator MELCHER. After you, I, and Mr. Mills met.

Mr. FRITZ. Yes.

Senator MELCHER. So that is where the money decisions are made, in your office, or Mr. Watt's, OK.

Really, there was no need for the $500,000 at all, was there? There was no need of this on February 25. It was drafted on February 23 and then it was stamped February 25, and was signed for you by, I guess, S. M. Crosby. There was no need because there were no vouchers in then and if you had been advised that there had been some vouchers you could have sent out $30,000 if you felt like it.

Mr. FRITZ. I am going to let Mr. Cole respond to that because they are the ones who are always, as he indicates, leaning on me for money.

Senator MELCHER. Well, I can understand that, too. I lean on you, too, but I do not get any.

Mr. FRITZ. Yes, sir.

Mr. COLE. As far as funds needed for the contract, if the contract were to be carried out, the successful contractor, CH2M Hill, indicates that, in 1983, there would be funds somewhere in that neighborhood that would be needed, since this is a cost reimbursable contract.

Senator MELCHER. Yes.

Mr. COLE. Just so that there was some figure in there of anticipated expenditures was all that we were concerned about.

Senator MELCHER. All right.

[The prepared statement of Mr. Fritz follows:]

PREPARED STATEMENT OF JOHN FRITZ, DEPUTY ASSISTANT SECRETARY FOR INDIAN AFFAIRS (OPERATIONS), U.S. DEPARTMENT OF THE INTERIOR

Mr. Chairman and members of the Committee, I am pleased to present the views of the Department of the Interior on the issues that have arisen respecting the representation by the United States of claims to reserved water rights on behalf of the Blackfeet Indian Tribe.

Assistant Attorney General Dinkins has described the kind of evidence that we think is necessary in order to be successful in an adjudication of the tribe's water rights. I intend to testify about problems that have arisen in carrying out our responsibilities as trustee to the Blackfeet Tribe, particularly with regard to protection of the tribe's reserved water rights.

Litigation is pending in both State and Federal courts in Montana to quantify the water rights of the Blackfeet Tribe. An underlying issue in the adjudications is whether Indian reserved water rights in Montana should be tried in State or Federal court. That issue was recently argued before the Supreme Court and should be decided by June of this year.

The United States is currently representing the Blackfeet Tribe as its trustee in two water right adjudications. The first adjudication is in Federal court and was brought by the United States at the request of the Blackfeet Tribe. The second adjudication is in State court and was brought by the State of Montana.

The Blackfeet Tribe is now requesting that the United States cease representing them in both adjudications. This we have so far refused to do because of our concern for the potential adverse consequences to the Tribe. If the United States dismisses the Federal proceeding as the Tribe now requests, the United States would still be a party to the State court proceeding and the Tribe's water right could be adjudicated there.

We are thus convinced that the United States as trustee for the Tribe must prepare itself to present the Tribe's claims. We simply cannot permit the Tribe's right to be adjudicated by default.

The Blackfeet Tribe now refuses to let the officials of the United States or their agents on the reservation to conduct studies in preparation for litigation. The tribe believes that prior studies are adequate for litigation; we disagree. Our disagreement is based on experience in other water rights adjudication and the opinion of the Justice Department attorneys who specialize in this kind of litigation.

We intend to continue to work with the tribe to resolve the difficulties just outlined.

This concludes my prepared statement. I would be happy to answer any questions you or members of the Committee may have.

Senator MELCHER. You have been very patient on this, Carol, and we have your prepared testimony, which makes some nice legal points, well documented. Without objection it will be made a part of the record.

I am gathering Justice was not advised by the Department of the Interior of the tribe's activities, or were you?

STATEMENT OF CAROL E. DINKINS, ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mrs. Dinkins. Yes, sir; we were aware of the tribe's activities here.

Senator Melcher. Were you aware of the first objection in 1981?

Mrs. Dinkins. Yes, sir.

Senator Melcher. Then you were aware of the second objection in 1982? I am talking about letters they sent through channels as described by Earl Old Person and also letters that he sent to my office and then my letters to the Department of the Interior. Are you aware of all of that?

Mrs. Dinkins. Well, I was not personally aware of your letters. I have not seen those. But my staff has stayed in close contact with Interior and certainly has been aware of the fact that the tribe has objected.

Senator Melcher. Is it your opinion that—well, I will ask one other question in between, but I will ask this question right now because it follows the other one. You really do not get into the inner workings of letting the contract for the soils study itself, reviewing what the proposals are or anything of that nature, do you?

Mrs. Dinkins. Well, my staff was involved with Interior in determining what information was required so that we could prepare the case for litigation. My staff was also involved in reviewing the information that was contained in the request for proposal. Then my staff also made comments when it believed that there was additional information that perhaps would be advisable that was not contained therein.

Senator Melcher. Well, do you get into it to the extent of knowing that in the Office of Trust Responsibilities, in reviewing the proposal, Mr. Corke wrote down all of the items of duplication, pointing out in the proposal they were duplicating the Morrison-Maierle study?

Mrs. Dinkins. I do not know whether we ever saw their internal comments, such as that.

Senator Melcher. So, you are not really in on the Morrison-Maierle study then?

Mrs. Dinkins. Well, in the sense of the fact that we reviewed the study that Morrison-Maierle did and we had requested that Interior obtain the backup data, which Morrison-Maierle refused to provide.

Senator Melcher. You say you are aware of the Morrison-Maierle study. Does that mean you are aware of the actual information in the Morrison-Maierle study?

Mrs. Dinkins. Well, we have a copy of the report that was prepared by Morrison-Maierle and that was reviewed by my staff. What we do not have is the backup data, the field surveys, the logs, the field notes, that were done to prepare that study. That is the information that Morrison-Maierle has refused to provide to Interior.

Senator Melcher. Why?

Mrs. Dinkins. All I know is what is contained in the correspondence that Morrison-Maierle has sent to Interior and that indicates that they refused it because the tribe did not want it provided.

Senator MELCHER. Are we not just fencing with words a little bit here, Mrs. Dinkins? Is it not that they could not release the data by sending it to you? Is not that what we are discussing?

Mrs. DINKINS. They have not provided the data to Interior.

Senator MELCHER. Is that not what we are talking about; they could not send the data to you?

Mrs. DINKINS. Well, I have heard Mr. Maierle testify this morning that they had provided it, but we disagree with that.

Senator MELCHER. Pardon me?

Mrs. DINKINS. We do not agree with his statement that they have provided that data or given us access to it.

Senator MELCHER. Is it important to you to have the data?

Mrs. DINKINS. Yes, it is important.

Senator MELCHER. Have you pursued it through the Bureau of Indian Affairs?

Mrs. DINKINS. Yes, sir.

Senator MELCHER. To what extent? To the same extent one of the people who did not get the contract did, review it with the area office, and ask what the area office knew about it and ask whether they could look at the data?

Mrs. DINKINS. Well, we have asked for the data. Interior has worked with Morrison-Maierle and they have not received the data, not received access to it.

Senator MELCHER. That was not my question.

Mrs. DINKINS. Exactly what was your question.

Senator MELCHER. Have you worked through the Bureau of Indian Affairs, through the area office, the same as one of the firms that wanted to present a proposal, and asked Morrison-Maierle to review the data in Helena?

Mrs. DINKINS. Well, I do not know the exact extent of what that particular firm has done. We have suggested to Interior that if the firm refuses to provide the data, that it may be appropriate to institute suit to obtain the data. We believe that the Government is entitled to it under the contract.

Senator MELCHER. We will get to that point later. I think you can get that data any way you want it through court, but we will get to that later. I am just asking you whether, through this friendly process, that apparently one of the firms who was responding to this request for proposal by the Department of the Interior, went up to Morrison-Maierle, along with somebody from the area office and looked over the information?

Mrs. DINKINS. Senator, that is part of the dispute that we have with Morrison-Maierle, whether or not they did provide us access to all of the data and whether they provided us enough time for us to look at the data.

Senator MELCHER. Is the answer to my question no?

Mrs. DINKINS. I do not know the exact amount of activity by the firm that you mentioned to gain access.

Senator MELCHER. No, no. I am just asking you whether you did, or the Department of Justice did, exactly as this firm did, and it can be a yes or no answer or you do not know.

Mrs. DINKINS. Well, I am telling you exactly what the Department of Justice did. I cannot see whether it is exactly what the firm did because I do not know what they did. But we have tried, through the Bureau of Indian Affairs, to obtain the data that we believe is necessary here. That is what I am trying to answer for you.

Senator MELCHER. That is not my question. I am going to pursue it. My question is whether the Department of Justice, though the Bureau of Indian Affairs and the area office, attempted, as this firm did, and I am describing what this firm did so you know what this firm did as far as I know—they asked the BIA whether they would participate with them at the area office level to go to the Helena office to look at the data. I am just asking you whether you did that or not.

Mrs. DINKINS. We requested that BIA go to look at the information and my understanding is that BIA did do that with the private firm.

Senator MELCHER. So you had access to it through the BIA?

Mrs. DINKINS. We do not believe we had complete access to it. That is where the dispute lies.

Senator MELCHER. Oh. You are saying that you know it was done?

Mrs. DINKINS. I do know that the BIA went to look at the information. What I said earlier is that, and what I still mean is, that we are not confident that we saw all of the data and we are not confident that there was ample time to review all of the data in this process.

Senator MELCHER. Was it ample enough to determine that a lot of it was duplicated?

Mrs. DINKINS. You would have to ask BIA that question.

Senator MELCHER. We have. You heard Mr. Corke say it was duplicative

Mr. DINKINS. Well, Senator Melcher, the information that we need to prepare for trial includes the field data—we would need the borings at various points on the land and would need the, perhaps, backhoe information. It is information that we do not believe is part of the Morrison-Maierle study, information that goes beyond that study.

Senator MELCHER. Then have you identified what parts of the study is duplicative?

Mrs. DINKINS. No, sir.

Senator MELCHER. Well maybe I will let you tell me. Am I to assume that the spending of how much this costs, is just up to the Department of the Interior, that, that is not your business or what?

Mrs. DINKINS. The Department of the Interior is the agency which prepares the request for proposals and then prepares the contracts with the company. We work with them to assure that the information that they are going to obtain, if it is for preparation for litigation will, we believe, meet the standards required by the courts.

Senator MELCHER. I am just assuming that if there is duplicative information, as has been testified by Morrison-Maierle, by the tribe, by Mr. Corke and by, I guess admitted, by Mr. Mills—is that correct? Did you admit that or not?

Mr. MILLS. No, sir, I did not.

Senator MELCHER. Oh, all right. Your Office of Trust Responsibilities, part of it admitted it. That that is their business and you are only going to tell them what you need. Is that it, Mrs. Dinkins?

Mrs. DINKINS. We tell them what we believe that we need so that we can try the case.

Senator MELCHER. How many assistants do you have here with you now; two or three?

Mrs. DINKINS. I have several people here with me now.

Senator MELCHER. You have several people besides the U.S. attorney. You could use the U.S. attorney and whoever he has working for him in Billings to get all of this data, could you not?

Mrs. DINKINS. Well, we are preparing much of the litigation here.

Senator MELCHER. Yes, but there is some data out in Helena and the U.S. attorney is in Billings, so you would use him, or whoever is there, to go into court and ask for it, could you not?

Mrs. DINKINS. Well, we perhaps would do that. It would depend on what case we were working on and where we were in the case.

Senator MELCHER. Are you not about there now? You want it and you can go into court and ask for an order to have it?

Mrs. DINKINS. Well, that is one thing that we could do; yes, sir.

Senator MELCHER. It is available to you and has been available to you last month and today, has it not?

Mrs. DINKINS. Yes.

Senator MELCHER. So, Morrison-Maierle are doing what they are supposed to do; is that correct? They are following legal advice, too.

Mrs. DINKINS. I do not know what they are doing, Senator Melcher.

Senator MELCHER. I thought he stated it. I thought Maierle stated it. He stated that they were not free to send you the data. They were also advised by counsel or they determined that legally it could only be looked at in the office.

Mrs. DINKINS. Well, it is our position that under the contract they are obligated to provide the information.

Senator MELCHER. Well, under any of that, you could ask for it through discovery in court and get it by court order.

Mrs. DINKINS. Well, we could seek it through court order, yes, sir.

Senator MELCHER. Does the tribe have a right to bar access to their lands?

Mrs. DINKINS. Senator, we have urged, throughout this, that the Department of the Interior and the tribes work within the system to accomplish what we all need to do here.

Senator MELCHER. That is what we are trying to do, too. But this is just a legal point I do not understand. The tribe has passed a tribal resolution. They say they are going to deny access to their lands for this soil study because of the reasons we have repetitively mentioned here. Now, do they have that legal right?

Mrs. DINKINS. I have not researched that question, Senator.

Senator MELCHER. You have no opinion about it at this time?

Mrs. DINKINS. Well, I do not wish to say right now.

Senator MELCHER. All right, I will not press it. But if they did, all of this is a bunch of baloney, is it not, letting the contract for a soil study that cannot be executed? Do they have that legal right?

Mrs. DINKINS. Well, Senator, by treaty the Bureau of Indian Affairs and its agents have the right to go on the land. We have urged, again, that Interior seek to come to some accomodation with the tribe in this matter.

Mr. FRITZ. Senator, if I may interject. I consider the chairman's request or invitation, I guess, for myself to come to the reservation, either in the company of Mr. Mills or with other representatives of the U.S. Government to still stand and, as a matter of fact, at the close of my written comments this morning, I indicated that we are more than willing to discuss with the tribe any sort of arrangements which might come to fruition.

But our basic position still, Senator, is that we have, within the Bureau of Indian Affairs, a substantial dispute over the type of study that is necessary in order for us to act as a responsible trustee on behalf of the tribe. And our people on the ground in Billings indicate that the soil classification contract, which is the subject of this hearing today, is a more detailed study of the chemical analysis of the soils. It will also provide deep holes to determine drainage barriers and it will provide other laboratory analysis which will verify for Ms. Dinkins and her staff the necessary information for the court proceedings and, thus, justify the expertise to determine whether the soils themselves are practicably irrigable.

It still comes back to the basic dispute of whether the first study by Morrison-Maierle in the 1970's was complete enough. In my analysis, taking into account the work of Mr. Mills and his staff, and taking into account the work of Mr. Whitesell and his staff, the Morrison-Maierle study was merely an addendum to the water resource investigation. It looked at the future water requirements and soil type but it really did not provide us the detailed land classification which is necessary in order for the Department of Justice to provide a defensible position in terms of the determination of the irrigability of lands over a sustained period.

So we still come back to the basic dispute about the credibility of the two studies.

Senator MELCHER. Well, I often give the quote of Everett Dirksen. "A million dollars here, a million dollars there and pretty soon it adds up into big money." This is only about $1.2 million, which is not big money in the Department of the Interior's budget, but it is big money to waste and there are questions involved here.

The farther we go with it the more tiresome it gets in letting a contract that obviously duplicates work previously done. For the Department of Justice to say they want some more information is really typical of anybody preparing for a lawsuit, so I do not fault the Department of Justice, per se, in saying they want some more information, because I suspect there is not any time anybody has prepared for a lawsuit that they would not get more information if they had enough money to acquire it.

The tiresome part about it is there is seemingly a lot of money available for this, which really stretches all imagination to believe that it makes any sense at this time, not knowing, not having an opinion, not having a judgment, not having resolved the question on access, and it does not make any difference, Mrs. Dinkins, whether you say it is something you rather not answer. I think you are correct; you should not answer that. You are going on and pursuing this matter of whether or not you can get another soils study going to develop further information, despite the fact that you are going to have to contest or coerce, or I will use an easier term, convince the tribe that you have right of access or get it peacefully and willingly.

You just cannot do a soils study to get additional information unless you know, first of all, what additional information you want. If you do not know what information is there I do not see how you can tell us you need additional information.

Now you heard Morrison-Maierle, who are nobody's fools in this business, state they think it is all there. You have heard the tribe say if it is not all there, it is our fault and we will bear the consequences; it is our land. You have heard the people, the professionals in the Office of Trust Responsibilities, or at least one expert in the Office of Trust Responsibilities, say that he thinks it is practically all duplicative. Now that seems to say to me that if you want to continue to pursue spending the money on whatever you are going to do on this lawsuit, you ought to at least determine what the facts are about it being duplicative.

You have not done it and you have a very simple means of discovery to go through. If the Federal Court denies you that right of discovery then you have at least got that and you can go on to something else. But I do not think it is going to be denied. In my judgment it is likely not to be denied.

Mrs. DINKINS. I agree with you. We have tried to obtain the backup information so that we could determine whether or not there was duplication.

Senator MELCHER. You have not used that means available to you which was available to you at all times.

Mrs. DINKINS. Well, we are looking into that, Senator, and we have discussed that with Interior.

Senator MELCHER. Well, at any rate, you could have advised the Department of the Interior, "don't let a contract until we know what we need." You did not do it.

You have described working very closely with the Department of the Interior on all of this stuff, but you did not advise them to not let a contract until you knew exactly what you needed.

Mrs. DINKINS. Senator, there is considerable information that we have identified today that we do believe that we need, such as profile borings and barrier borings. There is no indication that these things were done or where they were done, if they were done at all, in the Morrison-Maierle study.

Senator MELCHER. Mrs. Dinkins, you could not represent me or anybody else in this room in a private lawsuit and say we are going to spend *x* number of millions of dollars to prepare for that lawsuit based on what you have told us so far. Now, what is different about using Government money and using private money?

Mrs. DINKINS. Senator, the Department of Interior representatives and the Justice lawyers have looked very closely at what is needed to present the case before the courts to prove what are the Indians' water rights in this case. That is how we have established the contract that is under question here. That is what information we have developed, the information that we believe is necessary to prove the water rights here.

Senator MELCHER. That still evades the point though. You do not know how much information is available until you get it. Second, you do not know whether you can get on the reservation or not. You are not going to, probably, unless the Office of Trust Responsibilities and the Department of the Interior tells you that in their opinion you can violate the tribe's resolution on access. Is that not true?

Mrs. **Dinkins.** Well, as I mentioned earlier, Senator——

Senator **Melcher.** I know you want to do it peacefully and this committee wishes you could do it peacefully too, but we find it very hard to disagree with the tribe that most of this information is already available, or a good chunk of it is available. I think we will pursue this now from here on out, first of all on the issue of the contract, whether or not we do not want to intervene on any further money being expended on this contract. So that leaves you with a series of options too.

I think it is safe to say that as of right now there will not be any further execution of this contract unless Secretary Watt can convince us that it is in the public interest and it is money well spent. $30,000 was obligated to CH2M Hill at least on March 25 or March 23, I personally am not going to object to that being paid and I doubt whether anybody else on the committee would. I think we would be hesitant to look favorably on the balance of the $100,000, the balance between what the voucher said had been submitted and up to the $100,000 that Secretary Watt has now approved for obligation, unless we are advised of some different facts than what we have learned so far.

I want to thank you, Mrs. Dinkins, and Mr. Fritz, and Sid Mills, Matt Cole, and Mr. Corke for your candor in this.

[Mrs. Dinkins prepared statement follows:]

PREPARED STATEMENT OF CAROL E. DINKINS, ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE

Thank you for the opportunity to testify as to the need for funding a study to determine irrigable acres on the Blackfeet Reservation in Montana. This study is needed to support litigation in which the United States is involved on behalf of the Blackfeet Indian Tribe.

Let me begin by describing that litigation.

On April 5, 1979, four general stream adjudications were filed by the United States in the United States District Court for the District of Montana. These suits seek an adjudication of all rights, to the use of water in the stream systems made subject to the adjudication, whether based on federal law or state law. Each case asserts that the United States has reserved for the benefit of a named tribe of Indians the right to use water in sufficient amount to satisfy the purposes for which the tribe's reservation was established. The complaints also assert that the United States has reserved or obtained water rights for its own use.

Two of the adjudications *United States* v. *Arvin S. Aageson, et al.*, Civil No. Cv-79-21-GF and *United States* v. *AMS Ranch, et al.*, Civil No. Cv-79-22-GF, pertain to streams flowing through the Blackfeet Reservation. In each such case, the United States is claiming reserved water rights for the benefit of the Blackfeet Tribe in sufficient amount to fulfill the purposes for which the reservation was established. These actions were supported by the Tribe through tribal resolution and in testimony before this committee some four months after initiation of the United States action. The Tribe, however, has not chosen to intervene in either of the lawsuits.

On May 11, 1979, the State of Montana enacted a new statutory scheme requiring the adjudication of all water rights throughout the State, including the right to use the waters that arise on, under, or are adjacent to the Blackfeet Indian Reservation. Montana Senate Bill 76, MCA-85-2-101, *et seq.* That legislation provided for the adjudication of these water rights in state court. Pursuant to the provisions of Senate Bill 76, the United States filed a Statement of Claims with the Montana Department of Natural Resources and Conservation to use of water in Montana, asserting that it had reserved rights to use sufficient water to fulfill the purposes for which the reservation was established. We also asserted the right to use water for other purposes under federal and state law. In filing a Statement of Claims with the State administrative body, the United States said that all waters arising on or adjacent to the Blackfeet Reservation were required to fulfill the purposes of the reservation. In that Statement, the United States also reserved the right to object to the state court's jurisdiction. The Blackfeet Tribe has not filed a Statement of Claims to the use of water on its own behalf in the state adjudication.

In November, 1979, the federal district court in Montana dismissed the federal adjudications in favor of the state adjudication. That order was later reversed by the United States Court of Appeals for the Ninth Circuit in *Northern Cheyenne, et al.* v. *Adsit, et al.*, 668 F.2d 1080 (9th Cir.), and the case is now under review by the United States Supreme Court.

Regardless of the Supreme Court's eventual ruling in *Adsit*, it is evident that the United States will be required to substantiate its claim for water on behalf of the Tribe in some forum—state or federal. Qualification of such a claim requires, in part, a determination of the "practicably irrigable acreage" on the reservation. *Arizona* v. *California*, 373 U.S. 546 (1963) ; Slip Op. 1983.

"Practicably irrigable acreage" is a term developed by Special Master Rifkin in his report in *Arizona* v. *California*, which was adopted by the Supreme Court in 373 U.S. 546 (1963) and can be essentially defined as those acres to which water can be put to beneficial use for irrigation purposes. If a reservation has substantial land that has never been irrigated, a determination as to which lands are practicably irrigable can be made only on the basis of expert examination of the land by a land classifier and an agricultural engineer. The land classifier develops land classification standards and based on these determines whether lands would be arable if irrigation were applied to them. His analysis considers topography, geology, hydraulic conductivity, chemical analyses, depth to barrier and other considerations. His examination necessarily entails taking numerous soils samples by augers and back-hoes.

Once he has classified the soils and examined the tracts, the land classifier passes the results of his study and the raw data, on which the study is based, to the agricultural engineer, who basically is required to determine crop water requirements and design an irrigation and drainage system to meet those water requirements. In order to do this, the agricultural engineer utilizes the land soils data gathered by the land classifier, since they must jointly determine such things as the water intake rate, the water holding capacity of the soil, and the net depth of irrigation for each field.

Prior to requesting the Bureau of Indian Affairs (BIA) to issue a Request for Proposals for a land classification study on the Blackfeet Indian Reservation, the Department of Justice and the Department of the Interior determined that existing soils studies of the Blackfeet Indian Reservation were not adequate to meet the test of litigation. Included in the review by the BIA were studies performed by the Bureau of Indian Affairs, conducted in 1957 and 1966, and certain studies by Morrison-Maierle, performed in the 1960's and the 1970's. Specifically, the BIA looked at the study performed by Morrison-Maierle at the request of the BIA in 1979 entitled "Irrigable Soils Classification". Our decision was that none of these studies was of sufficient detail to withstand the close scrutiny of a judicial forum. In particular, the 1979 Morrison-Maierle study did not contain the appropriate data upon which an agricultural engineer could rely in performing his tasks. Moreover, as correspondence before this committee indicates, the back-up data to the 1979 Morrison-Maierle study was never delivered to the United States pursuant to the terms of the contract with them. As I explained earlier, without this data the agricultural-engineer cannot design the required irrigation systems that demonstrate irrigability.

Accordingly, we requested the BIA to secure the services of an experienced land classifier to advise us and to prepare for litigation. To assure that the product we received would be sufficient for trial, my staff participated in the drafting of the request for proposals ; in reviewing the responses ; in interviewing the final candidates ; and in the selection of CH2M-Hill.

This is not a case of repeating work that has already been done or duplicating a soils study. The United States must present a solid case in support of its claims for the Blackfeet Tribe including detailed soils data. This data is critical because it forms the basis upon which the agricultural engineer will determine what soils are irrigable. As the United States' representatives in this litigation, it is imperative that we be permitted unfettered discretion to define the criteria upon which an expert will base his study. Only then can we be assured that the expert's opinion, when given in court, will meet the high standard of proof as defined in law, in *Arizona* v. *California*, 373 U.S. 546 in 1963 and again in 1983.

Senator **Melcher.** We have asked for some additional information that I am sure you can dig out for us and provide for the record.

I would like also that you supply a copy of a memorandum today, I think you can find it today, I do not know whether to call it a memorandum or a document, but supply either one. The Department of the Interior's Solicitor's Office prepared a paper entitled "The Nature and Extent of the Secretary's Trust Responsibility When Indian Interests Conflict With Other National or Departmental Interests."

This seems to have some bearing on the points we have been discussing and may give us a better idea of how this present conflict between the tribe and the Department developed, and perhaps, how it can be resolved.

I am certainly of the opinion that all of these matters can be resolved. I would like them to be resolved as quickly as possible in terms of this contract and in terms of the tribe's resolution against access. I guess, if we resolve the contract dispute, we have resolved the access dispute almost automatically. It would not be anything that anyone had to be concerned about in the future.

I made reference in my opening statement to a memorandum dated January 14, 1981, signed by Daniel Rosenfelt, Office of the Solicitor, Department of the Interior and just so it is clear what I was citing, we will make that part of the record.

[The memorandums follow:]

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

OCT 28 1981

Memorandum

To: Under Secretary

From: Associate Solicitor, Energy and Resources

Subject: Nature and Extent of the Secretary's Trust Responsibility when Indian Interests Conflict with other National or Departmental Interests

I. Introduction

This memorandum responds to your request for an explanation of the Secretary's trust responsibility in situations such as recently arose in the Acquavella litigation, Yakima Indian Nation v. United States, Civ. No. C-77-129 (E.D. Wash.). That case involves adjudication of water rights on the Yakima River, including water appurtenant to the Yakima Indian Reservation. The legal position that the Indians would like us to adopt directly conflicts with the legal position of the Bureau of Reclamation ("Bureau"). The Indians' position, if adopted, would also disrupt the present operating procedures used and contracts executed by the Bureau. This conflict must be resolved since the Department of Justice will only adopt "one" position for the United States. Therefore, one of the two conflicting interests, either the Indian's or the Bureau's, will not be represented to the extent they are contradictory.

In an abundance of caution, the Department tentatively decided to adopt the Indians' position in the Yakima River litigation. This was done in substantial part to ensure that the "trust" responsibility to the Indians was discharged. The Bureau complains that as a result of this decision its position will not be fully and vigorously asserted. The Bureau has therefore asked that they be allowed to retain separate counsel and I have informed them there is no authority for other representation. The question you have asked is whether, in such a conflict situation, the Department is required by its trust obligation to support the Indians' claims regardless of the merits of the respective positions. This memorandum clarifies when the Secretary is bound by his trust obligation to represent the Indian claims and when the Secretary has the discretion to choose between representing Indian and other national or Departmental interests.

II. The Nature and Extent of the Secretary's Trust Responsibility

In general, the Indian tribes enjoy a unique legal status under federal law, based on what has been characterized as a "guardian-ward" status. Morton v. Mancari, 417 U.S. 535, 551 (1974). That the relationship resembled that of a ward to his guardian was first recognized by Chief Justice Marshall in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). "[The government's] conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." Seminole Nation v. United States, 316 U.S. 287, 297 (1942). In attempting to define the nature and extent of this unique relationship, it should be noted there is no constitutional or supra-constitutional trust responsibility, but instead there is "essentially a moral obligation, without justiciable standards for its enforcement." R. Chambers, Judicial Enforcement of the Federal Trust Responsibility to Indians, 27 Stan. L. Rev. 1213, 1227 (1975).

The fiduciary duty arises only from a treaty, statute, or executive order. United States v. Mitchell, 445 U.S. 535 (1980); North Slope Borough v. Andrus, 642 F.2d 589, 611 (D.C. Cir. 1980); Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379 (1st Cir. 1975) ["fiduciary relationship . . . must indeed be based upon a specific statute, treaty, or agreement which helps define and, in some cases limit the relevant duties . . . ."] In the absence of clear language, the trust responsibility to the Indians is only a very limited one. "Without an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists, it is a limited one only." North Slope Borough, 642 F.2d at 612. The trust relationship necessarily arises from and is limited by the authorizing statute, treaty, or executive order. It follows that Congress and the President may make the trust responsibility as broad or narrow as they wish.

Congress has enacted numerous laws and the Senate has ratified numerous treaties governing tribal land and other property and providing for services and assistance to Indians. These measures are often construed in favor of the Indians on the judicial assumption that Congress intended to act to benefit the Indians. E.g., United States v. Santa Fe Pacific Ry., 314 U.S. 339 (1941). After taking into account the usual rule of construction in favor of Indians, it is the particular statute, treaty, or executive order concerned which ultimately is the source of rights and obligations of those affected. Chambers, supra at 1214-1215.

The creation of trust duties may arise by implication when an Indian property right is created, even though the language of the treaty, statute, or executive order may not explicitly describe the trust obligation. 1/ For example, a specific duty to protect Indian property has been inferred from the Indian Non-Intercourse Act, 1 Stat. 137, 138, now codified as 25 U.S.C. 177 (1976). "The Non-Intercourse Act imposes upon the Federal government a fiduciary's role with respect to protection of the lands of a tribe covered by the Act. . . ." Passamaquoddy, 528 F.2d at 379. Most commonly, trust responsibilities arise from treaties setting up Indian reservations. While most, if not all, such treaties fail to establish explicit trust duties, courts have found such duties implicit in the granting of property to Indians. See, e.g., Heckman v. United States, 224 U.S. 413 (1912); United States v. Kagama, 118 U.S. 375 (1886). The trust responsibility almost always arises in connection with the Indian interests in real property, specifically property appurtenant to reservations.

III. Secretary's Duties as Trustee

With regard to the protection of Indian property rights, the Secretary is generally in a position similar to that of a trustee of private property, i.e. he must take reasonably prudent steps to protect the trust corpus which he is holding for the beneficiary. More specifically, the trustee is under a duty to exercise due care and prudence to preserve the trust corpus. Coast Indian Community v. United States, 213 Ct. Cl. 129, 550 F.2d 639, 653 (1977). The ordinary standards of a private fiduciary must generally be adhered to by the executive officials administering Indian property. E.g., Menominee Tribe v. United States, 101 Ct. Cl. 10, 18-19 (1944); Navajo Tribe v. United States, 364 F.2d 320,

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1/ Where no property right is involved, a trust duty will not arise unless there is an explicit provision clearly defining that duty. See, North Slope Borough, supra. The cases in which a trust duty has been found to arise by implication have consistently involved property rights. However, even where Indian land is involved, courts will not hold the government to fiduciary standards unless there is an unambiguous manifestation of Congress' or the President's intent to create a trust. United States v. Mitchell, supra. On remand in Mitchell, the Court of Claims found that a fiduciary obligation was intended because a series of statutes expressly required that timber sales from certain Indian lands "be based upon a consideration of the needs and best interests of the Indian owner and his heirs." Mitchell v. United States, Nos. 772-71, 773-71, 774-71 and 775-71 (Ct. Cl. Oct. 21, 1981) (slip op. at 6-7, 12).

322-324 (Ct. Cl. 1966). However, the Court of Claims has recently recognized that

> all the rules governing the relationship between private fiduciaries and their beneficiaries do not necessarily apply in full vigor to Indian claims against the United States. 'In each situation, the precise scope of the fiduciary obligation of the United States and any liability for breach of that obligation must be determined in light of the relationships between the Government' and the Indians. Mitchell v. United States, Nos. 772-71, 773-71, 774-71, and 775-71 (Ct. Cl. Oct. 21, 1981, on remand from Supreme Court) (slip op. at 13-14).

In discharging his trust responsibilities the Secretary must be cognizant of and protect Indian rights. Indian property rights cannot be sacrificed to other interests of the Department, since the trustee is legally bound to protect the corpus of the trust. For example, in United States v. Truckee-Carson Irrigation District, Slip Op. Nos. 78-1115, 78-1493 (9th Cir. June 15, 1981), an action was brought to quiet title to water necessary to sustain a fishery on an Indian reservation. The district court, recognizing that the Reclamation Act of 1902 created a conflict between the need to develop reclamation projects and the responsibility to protect Indian property, held that the Reclamation Act, by authorizing the Secretary to use the greatest possible discretion in acquiring property through his condemnation power, gave the Secretary the power to extinguish Indian water rights. This analysis was flatly rejected by the Court of Appeals:

> [A] general statute, such as the Reclamation Act, is not interpreted to authorize the extinguishment of Indian property, absent a clear showing of congressional intent.
>
> Accordingly, we reject the defendant's suggestion that the Reclamation Act of 1902 conferred on the Secretary authority to extinguish the Pyramid Lake Tribe's water rights. Slip Op. at 2933.

Moreover, in cases where inaction will cause the loss of a property right, the Secretary must take affirmative action to enforce that right and preserve the Indian property. Poafpybitty v. Skelly Oil Company, 390 U.S. 365, 369 (1968); Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp.

252, 257 (D.D.C. 1973). Such affirmative action may take the form of asserting a legal claim or promulgating regulations to prevent waste of the trust corpus, as in the *Pyramid Lake* case. Stated differently, in the absence of conflicting positions, the trustee must act as an ordinarily prudent man would act in managing his own property. G. BOGERT, LAW OF TRUSTS § 93 (5th Ed. 1973); *Redmond v. Commerce Trust, Co.*, 144 F.2d 140, 154 (8th Cir. 1944), *cert. denied* 323 U.S. 776 (1944).

In some instances, acknowledged Indian *rights* are involved. In other instances Indian *claims* are involved. When Indian rights have been established, the Secretary must protect them. Similarly, he may not divest non-Indians of their established rights. Often, the question of whether there is a *valid right* is unclear. The "claim" to possess rights may be subject to varying degrees of question. In these situations where the legal rights are unclear, the Secretary has the discretion to exercise reasonable judgment both in determining the extent of the property rights and how best to protect those rights. *United States v. Mason*, 412 U.S. 391 (1973). For example, in *Mason*, the estate of a deceased Osage Indian argued that the government had breached its fiduciary duty by paying Oklahoma estate taxes on trust property which the estate claimed was exempt from such tax. Reasonable legal arguments existed on both sides of the issue of the state's power to tax the property, but the Government had chosen to rely upon a 25 year old Supreme Court decision upholding the Oklahoma tax. The Court of Claims held that the Government, as trustee, had an obligation to challenge the continuing validity of the decision by refusing to pay the tax. However, the Supreme Court reversed, holding that the decision not to litigate the matter and to pay the tax was a reasonable legal judgment on behalf of the trustee. The Court acknowledged that a trustee is not an insurer of trust property and stated that a trustee is given broad discretion to pay taxes claimed by a state "so long as the trustee's judgment that the taxes are valid or that the costs and risks of litigation outweigh the advantages is not wholly unreasonable." *Id.* at 398-399. The test in this case was whether a legal conclusion of the Secretary was reasonable in this situation. 2/ *Id.* at 400. In short, the Secretary is not required to take

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2/ Even if the Secretary's conclusion is not upheld by the courts and therefore "wrong," it may nonetheless be a reasonable legal conclusion and therefore within his discretion as trustee. *See* 2 A. SCOTT, TRUSTS 1419 (3rd. ed. 1967) (quoted in *U.S. v. Mason*, 412 U.S. at 398). In deciding whether the normal standard for government fiduciaries has been met, courts must ask "were their actions in good faith and within the realm of their acceptable discretion, or were they arbitrary, capricious, an abuse of discretion, or contrary to law?" *Mitchell v. United States*, *supra*, (slip op. at 13).

all actions which may benefit Indians, but rather must only take those actions necessary to protect trust property. When the uncertain Indian claim does not conflict with other national or Departmental interests, the Secretary must simply use discretion to determine how the Indian claims may be protected. As a practical matter, litigation adopting the Indian claim may be the most suitable method to protect the claims.

However, the issue becomes more complex when there are mutually exclusive claims. To the extent that the claims asserted by the Indians vary from national or other Departmental interests, the Secretary must make a determination as to which claim is legally more defensible. See U.S. v. Mason, supra; North Slope Borough, supra. If a legal analysis of the issues shows that the Indian claim is the legally superior claim, the Secretary must adopt that position in a conflict situation. If, on the other hand, the Secretary concludes that the competing claim is equally defensible, he may adopt that position. In this latter situation, however, the Secretary has the discretion, assuming he does not act arbitrarily or capriciously, to support a colorable Indian claim even though it is not the legally favored position.

Thus, where there is reasonable uncertainty as to the Indian claim and where asserting such Indian claims would be detrimental to other national or Department interests, the Secretary has discretion to determine the course of action to pursue. See North Slope Borough, 642 F.2d at 613. In this situation, neither national interests nor Indian interests necessarily prevail. "The tension implicit in the Secretary's required actions - whether by statute or otherwise - cannot be transformed into a veto for any one particular set of interests which would halt the Secretary's delegated decisionmaking." Id. at 613. The application of this principle can perhaps best be demonstrated by a hypothetical example.

Assume that an Indian tribe is granted reservation lands by a treaty and that those lands have adjudicated water rights. The treaty does not expressly create a specific water right, but it arises by application of the Winters doctrine, Winters v. United States, 207 U.S. 564 (1908). Assume also that the tribe has historically "used" the water adjudicated to it ("X" amount) for its subsistence. Now the tribe wants to use a greater amount ("Y") for higher instream flows, asserting that additional sprawning grounds will be created thereby increasing fishing potential. Stream adjudication litigation is filed. The claim to Y amount of water directly conflicts with other uses of the river's water (i.e. the two "rights" cannot co-exist), which uses are preferred by the Bureau or the Fish and Wildlife Service. In determining whether to advance the Indian claim to Y, it is given that the Secretary must protect the tribe's property right in the water. Therefore, he must first determine the extent of that right, i.e., he must make a legal judgment as to whether the tribe is entitled only to X amount of water or whether it has a right to Y amount of water. If he determines that the tribe is entitled to Y amount of water, he is bound to protect that property right even though he may believe the national interest is to use that water for another purpose. In other words, he cannot make a policy decision which results in the extinguishment of an Indian property right. However, if he makes a legal judgment that the Indian's property right is only to X amount of water, then he is free to favor any of the conflicting uses, since there is no trust property right involved beyond X amount of water. In short, when the various legal rights are unclear, the Secretary may use discretion to determine the position to adopt. 3/

The conclusion reached in this memorandum is consistent with the decision in Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1973), one of the cases that most strenuously imposes trust duties on the Secretary. That case involved diversion of water for an irrigation district from a river which fed the same reservation fishery involved in the Truckee-Carson case, supra. The district court held that the Secretary had misconceived his trust responsibility by making a "judgment call" in attempting to balance the interests of the Bureau of Reclamation and the Indians when that decision resulted in extinguishment of legally cognizable water rights of the Indians. The court attached great weight to the fact that a suit was pending to enforce the Indian's "well founded water rights." Id. at 256. The court also repeatedly emphasized that the obligation of the trustee was to ensure that water not obligated to other users by contract was preserved pending adjudication of the Indian claims. Id. at 255, 256, and 257. It follows that the trustee was not required to assert the Indian's claim against valid contractual rights of the water district, but only to protect the property to which the Indians had a right. The Court held that the Secretary in that instance failed to exercise his authority to prevent unnecessary waste within the water district, the effect of which was to deprive the tribe of its water without legal justification. Id. at 257.

3/ I have not attempted to address the issue of whether the Department of Justice may "trump" the Secretary's discretion and adopt a different position.

IV. Advocacy of Indian Claims

If the validity of the Indian claim is a "close call," it may be advisable for the Secretary to assure that the tribe can assert its claim on its own behalf through its own counsel. As stated in Truckee-Carson, "[i]t is . . . appropriate for courts to be concerned with the adequacy of the government's representation of its Indian wards, and to grant tribes leave to intervene where proper." Slip Op. at 2936. It seems a good practice for the Secretary to give notice to the tribe at a time and in a manner which will permit the tribe to assert its claim through outside counsel if it chooses. Additionally, the Department may wish not to oppose intervention even though the Indian position may adversely affect the government's position.

Finally, it may also be good policy to provide for attorney's fees in close cases to remove any questions over whether the Secretary violated his trust obligation. The Secretary has discretionary authority to use appropriated funds for such purposes under the Snyder Act, 25 U.S.C. 13 (1976). 56 COMP. GEN. 123 (1976). However, attorneys' fees and expenses incurred in judicial litigation may be paid only when representation by the Department of Justice is refused or is otherwise unavailable, as in the case where a conflict of interest exists and the Government decides to represent the non-Indian interest. Id. Providing attorneys' fees for the assertion of Indian interests is wholly compatible with the Secretary's fiduciary obligations, New Mexico v. Aamodt, 437 F.2d 1102, 1107 (10th Cir. 1976), cert. denied, 429 U.S. 1121 (1977), and may protect him from potential liability in the event his determination that the non-Indian interest is the legally superior one proves to be wrong. Of course, the Secretary will be liable in such a case only if the court finds that a fiduciary obligation exists and that the Secretary's legal judgment was unreasonable under the circumstances. See United States v. Mason, 412 U.S. at 398; 2 A. SCOTT, TRUSTS ¶ 174, ¶ 176 (3rd ed. 1967).

V. Conclusion

In conclusion, several steps should be followed when two or more mutually exclusive claims arise, one of which involves Indian rights. A legal judgment must be made as to whether the Indian claim is superior. This includes all aspects of legal review, including an analysis of the authorizing statute, treaty, or executive order and a review of the relevant case-law and rules of construction.

If it is determined that the Indian claim is the legally superior one, the Secretary cannot take a position which fails to protect the trust property right. If it is determined that the non-Indian claim is equally defensible, the Secretary can nevertheless make a policy choice to assert the Indian claim if it is reasonable. Of course, the Secretary can also adopt the non-Indian claim. Finally, where both claims are colorable but neither can be determined to be "better" in a legal sense, then the Secretary may use discretion in adopting either position.

ALEXANDER H. GOOD

Alexander H. Good
Associate Solicitor,
Energy and Resources

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

14 JAN 1981

MEMORANDUM

To: Acting Director, Office of Trust Responsibilities

From: Assistant Solicitor, Water and Power

Subject: Expert witnesses in litigation

Enclosed is a copy of a letter which this office received from the Department of Justice concerning the letting of contracts with experts for litigation. It appears that the Department of Justice is concerned that certain experts employed by BIA Area Offices have advocated positions different from that of the United States and in some instances they have advocated views antagonistic to the government. The Department of Justice cannot use such persons as its witnesses in trial with the result that duplicate studies may have to be prepared.

I recommend that you send a copy of this letter to each of your Area Offices. Thank you.

Daniel Rosenfelt

Enclosure

JAN 16 1981

Senator MELCHER. Thank you all, very much. Do you have something to add, Mr. Fritz?

Mr. FRITZ. I would just like to add one thing before we leave, sir. I have sat here and listened to some of the issues raised about the personalities involved. I have no knowledge with respect to the questions you raised about certain individuals and their working relationships with various parties. But speaking for Mr. Mills and myself, I will summarily reject the possibility that anything untoward happened at our level. I am sure I am speaking for Mr. Cole also, because under no circumstances were we influenced one iota.

The three of us have talked extensively, not about this, but over a period of time about how near and dear we do hold the responsibility for the trust relationship between the U.S. Government and the people we represent. I just want to add that because I think it is imperative that people understand that we do view that with a professional responsibility. I cannot add any more.

Senator MELCHER. Well, our oversight function as a committee does always drag us into running the risk of impugning somebody's good name. We do not like to run that risk, but our questions are only asked out of necessity, to avoid any difficulty or any misunderstanding. It is better cleared up on the public record than it is left lying around for scuttlebutt. Thank you all, again, very much.

We will also make a part of the record, at this point, a statement submitted by the Colville Confederated Tribes and a statement from the White Mountain Apache Tribe.

[The statements follow:]

Colville Confederated Tribes
P. O. Box 150 - Nespelem, Wash. 99155 (509) 634-4591

April 12, 1983

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

STATEMENT
OF
MEL TONASKET
VICE CHAIRMAN OF THE COLVILLE CONFEDERATED TRIBES
COLVILLE INDIAN RESERVATION
NESPELEM, WASHINGTON

SECRETARY WATT'S TERMINATION POLICY

INTRODUCTION

I am Mel Tonasket, Vice Chairman of the Colville Business Council, the Governing Body of the Colville Confederated Tribes, Colville Indian Reservation, Nespelem, State of Washington.

At the outset, let me thank the Committee on behalf of all Western Tribes for your having undertaken to review the contract entered into by the Bureau of Indian Affairs to make duplicative soil studies on the Blackfeet Indian Reservation. Fortunately, the Tribes I represent on the Colville Indian Reservation have had an opportunity to review this matter in some detail. Importance of the conduct of the Bureau of Indian Affairs to the Colville Confederated Tribes and to all Western Indians is of the first magnitude.

I will say this now, that the Colville Confederated Tribes have received from the Bureau of Indian Affairs and the Department of Justice precisely the same bad treatment that the Blackfeet Indian Tribe is experiencing from those two agencies. I will further assure you that the objectives of the Bureau of Indian Affairs and the Department of Justice respecting the Blackfeet Indian Tribe and the Colville Confederated Tribes are exactly the same. Those agencies seek, using any means available to them, to reduce greatly the Reserved Indian Water Rights for the benefit of the conflicting interests represented by Secretary Watt. Their conduct is the very essence of bad government.

SECRETARY WATT IS WAGING WAR AGAINST THE WESTERN TRIBES THROUGH THE BUREAU OF INDIAN AFFAIRS

I state to this Committee that the single greatest enemy of Western Indian Tribes is the Bureau of Indian Affairs. It is taking its orders from Secretary Watt and its illegal direction from William French Smith, the Attorney General. In summary, their administrative and legal directions spell termination. That termination of the Western Tribes is being subtly conducted.

Just how subtly the attack upon the Western Indian Tribes is being conducted is exemplified by the subject matter of this oversight hearing. In the "Notices of Hearing" it is stated that the Senate Select Committee will hold an oversight hearing: "...on the disbursement of funds by the Bureau of Indian Affairs to do a study of the irrigable acres on the Blackfeet Reservation in Montana..."

To the ordinary person, a review respecting the disbursement of funds could not be very crucial to Western Indian Tribes. That is not, however, the case in regard to the Blackfeet Indian Reservation. Our investigations of the disbursement of funds revealed that the Bureau of Indian Affairs is aggressively attacking existing studies which establish a favorable basis for the Blackfeet Indian Tribe to assert claims to Reserved Water Rights. The entire purpose, the information we have advises us, is that the Bureau of Indian Affairs, acting on behalf of the Department of Justice is seeking to obtain, at great costs, new studies which will vastly undercut the basic water rights of the Blackfeet Indian Tribe.

If the Bureau of Indian Affairs and the Department of Justice are successful in vastly reducing the Blackfeet water rights, it is greatly to the advantage of Secretary Watt and the non-Indian constituencies that he represents.

I am personally acquainted with the tactics of the Bureau of Indian Affairs, the Solicitor's Office, the Department of Interior, and the Department of Justice in the attack of those agencies upon Indian Water Rights. I was designated by the Colville Confederated Tribes to be the Tribal Council Representative in the case referred to as Colville v. Walton, State of Washington, Intervenor and United States v. Walton, The State of Washington, Defendant [1]. I found that my problems did not pertain to the Defendants Waltons against whom the Colville Confederated Tribes had brought an action to adjudicate their rights to the use of water. My problems, rather, were the Bureau of Indian Affairs, the Solicitor's Office of the Department of the Interior, and the Department of Justice. Those agencies fully supported Defendants Waltons against the Tribes and vigorously attacked the nature, character and extent of the water rights of the Colville Confederated Tribes.

Surprisingly, moreover, the Department of Justice and the Department of Interior aggressively attacked the Colville Confederated Tribes in their claims to rights to the use of water for fisheries. I had previously thought that the United States, Trustee, acting through the Bureau of Indian Affairs, would gladly support the Colville Confederated Tribes in seeking to restore their fisheries that have been destroyed very largely by the United States of America in constructing dams along the Columbia River. I was seriously in error. Rather than supporting the tribes in their fishery efforts, the Department of Justice and the Department of the Interior vigorously opposed our claims for water for the purposes of fishery.

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[1] Colville v. Walton, 647 F2d 42, 46 (CA 9, 1981); Cert.Den. 102 S.Ct. 657 (1981).

I was confronted, moreover, with exactly the same tactic that is being utilized by the Bureau of Indian Affairs and the Department of Justice against the Blackfeet Indian Tribe. Our Tribes had employed Morrison-Maierle, Inc. to complete soil studies and land classifications. Morrison-Maierle had likewise undertaken hydrologic studies essential for the proper preparation of the Colville cases. We had found that the work in both soils and water by Morrison - Maierle had been excellent. Acting with Mr. Charles P. Corke of the Bureau of Indian Affairs, we had approved the Morrison-Maierle studies and had hoped that the Bureau of Indian Affairs, Solicitor's Office of the Department of the Interior and the Department of Justice would join in acceptance of that material.

Acceptance was no part of the plans of the bureaucracy. Rather, the Bureau of Indian Affairs, Solicitor's Office, Department of Interior, and Department of Justice undertook new studies particularly in vigorous opposition to the Morrison-Maierle soil and hydrologic studies. They brought in new material and contested throughout the trial the position taken by the Colville Confederated Tribes, both in and out of the courtroom. To suggest that those three agencies, including the Bureau of Indian Affairs, proceeded on the basis of a trustee seeking to assist the Colville Confederated Tribes is laughable. They were aggressors against the Colville Confederated Tribes in all aspects of the litigation. It was particularly shocking for the Colville Confederated Tribes to have the Department of Justice openly attack Charles P. Corke, employed by the Bureau of Indian Affairs, who had consistently cooperated with the Colville Confederated Tribes and who was called as an expert for the Tribes. Those agencies are today lining up against the Blackfeet Tribe as they closed ranks against my Tribe in the Colville cases.

I do not purport to analyze for this Committee the full impact of the new contract entered into by the Bureau of Indian Affairs to force a restudy upon the Blackfeet Indian Tribe. I can state with a certainty, however, that the contract is not entered into for the benefit of the Blackfeet. It is no more for the benefit of the Blackfeet that a new study be made than it was for the benefit of the Colville Confederated Tribes that the Bureau of Indian Affairs, the Solicitor's Office and the Department of Justice joined hands against the Colville Confederated Tribes in their litigation with the Defendants Waltons and the State of Washington.

This Committee must necessarily inquire as to the reason for the conduct of the Bureau of Indian Affairs respecting

Indian Reserved Rights to the use of water. It is my opinion based upon many years of study of the issues that the Department of Interior and the Department of Justice are immersed in conflicts of interest to which I have made reference. Secretary Watt is, of course, likewise immersed in those conflicts of interest and, in my view, is seeking to seize Indian rights to the use of water for the benefit of the non-Indian communities which he represents.

Gone is any pretense that the Bureau of Indian Affairs performed services for the Western Indian Tribes in the field of Western Water Rights. Rather, the Bureau of Indian Affairs is aggressively anti-Indian in carrying on the termination policies of Secretary Watt.

FORCING STATE JURISDICTION UPON THE WESTERN INDIAN TRIBES IS PART OF SECRETARY WATT'S TERMINATION POLICY

Inseparable from the issue of the Tribe's reserved rights to the use of water and reserved rights of fisheries has been the issue of the State's claim of jurisdiction over the Tribe's Reserved rights of both water and fishery. It is of extreme importance to the Blackfeet and to the Colville Confederated Tribes that the Court of Appeals of the Ninth Circuit in the Colville cases has specifically held that the Colville Tribes are immune from State control. From the standpoint of the Blackfeet Tribe, it is likewise of extreme importance that the Ninth Circuit, as early as 1939 in the case of United States v. McIntire, 2/ held that Montana's Water Rights law had no application within an Indian Reservation. In the Colville decisions, it was decided that the decision in McIntire would be applied in the State of Washington and that the Reserved rights to the use of water of the Colvilles there involved, could not be controlled by the State of Washington 3/.

In the light of those two explicit rulings, that neither the State of Washington nor the State of Montana had jurisdiction within Indian Reservations over Indian water rights, this Committee will understand my surprise when I examined the "Brief for the United States" in what is referred to as the Adsit cases in which the Department of Justice in explicit terms declared that the Indian Water Rights Decree in the Federal Courts would be "incorporated in the Comprehensive State court decrees which will be administered by State authorities." 4/

This Committee can rest assured that the aggressions of the Department of Justice that I have described above in

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2/ United States v. McIntire, 101 F2d 650, 654 (CA 9, 1934).

3/ Colville v. Walton, 647 F2d 42, 46 (CA 9, 1981); Cert.Den. 102, S.Ct. 657 (1981).

4/ Brief for the United States, p. 23, in the Consolidated Cases of Arizona v. San Carlos and Montana v. Northern Cheyenne [Adsit Decision] Nos. 81-2147 and 2188 in the S. Ct.

connection with the Colville Confederated Tribes and the Blackfeet Indian Tribe is well designed and well planned by Secretary Watt and the Attorney General against the Tribes. It is equally clear to me that, by attacking the Tribe's jurisdiction over its water rights and transferring that jurisdiction to the State of Montana, Secretary Watt and Attorney General Smith will take long steps toward termination of the Indian Tribes.

COLVILLE POLICY DECLARATIONS

In concluding this Colville statement on behalf of the Blackfeet Indian Tribe, I wish to bring to the Committee's attention a factor which I perceive to be of importance to the Indian Tribes throughout Western United States. The Colville Confederated Tribes have thoroughly analyzed the course of conduct by the Department of Interior and the Department of Justice in their attacks upon the Blackfeet Indian Tribe. Additionally, the Colville Confederated Tribes have carefully reviewed the Brief for the United States in the Supreme Court in the Adsit cases. My Tribes have moreover studied with great care the "MOTION TO SUSPEND ALL PROCEEDINGS IN THIS COURT RESPECTING THE WATER RIGHTS OF THE BLACKFEET INDIAN TRIBE, BROWNING, MONTANA, AND TO PRECLUDE THE SOLICITOR GENERAL OR ANY OTHER ATTORNEY OF THE DEPARTMENT OF JUSTICE FROM PURPORTING TO REPRESENT THAT TRIBE IN THESE PROCEEDINGS AND POINTS AND AUTHORITIES."

Predicated by my Tribes' support for the Blackfeet Indian Tribe, the Colville Business Council adopted two resolutions. The first of the resolutions adopted by the Colville Business Council is entitled, "REJECTING CONTENTION OF THE DEPARTMENT OF JUSTICE IN ADSIT CASES THAT McCARRAN AMENDMENT, 43 U.S.C. 666, AUTHORIZES STATES TO ADMINISTER RESERVED INDIAN WATER RIGHTS." A copy of that resolution is attached. In explicit detail and extensively, the Colville Business Council analyzes the basic errors of the Department of Justice in seeking to force State jurisdiction upon the Blackfeet and other Indian Tribes.

In addition to the resolution last mentioned, a copy of which is attached to this statement, the Colville Business Council adopted a companion resolution which is entitled, "COLVILLE CONFEDERATED TRIBES CONDEMN AS UNETHICAL, ILLEGAL AND GROSSLY UNPROFESSIONAL FOR THE DEPARTMENT OF JUSTICE TO PURPORT TO REPRESENT INDIANS IN WATER RIGHTS LITIGATION WHILE SIMULTANTANEOUSLY REPRESENTING ADVERSE CLAIMANTS TO TRIBAL WATER RIGHTS."

In that resolution the Colville Business Council extensively reviews the irreparable damage being experienced by the Indian tribes due to the all-encompassing conflicts of interest that pervade the conduct of both Secretary Watt and Attorney General Smith and their respective staffs in the Department of Interior and in the Department of Justice. A copy of that resolution is attached to this statement and submitted to this Committee.

I believe it most relevant that the Western Tribes are supporting the Blackfeet Tribe in its effort to preserve itself against the attacks of the Bureau of Indian Affairs and the Department of Justice. It is the sincerest hope of the Colville Confederated Tribes that this Committee will fully investigate the contract to which reference has been made and declare that it is highly improper for the Bureau of Indian Affairs to waste a million dollars in making a study which has been fully completed by Morrison-Maierle, a Montana firm, the work of which the Colville Confederated Tribes, all as stated above, has been found to be excellent.

CONCLUSION

I wish to thank the Committee for the opportunity of filing this statement and as stated above, it is vital to the Colville Confederated Tribes and all Western Tribes that the Blackfeet Indian Tribe be supported in the struggle to prevent the entrenched bureaucracy from destroying its water rights.

Mel Tonasket

Mel Tonasket
Vice Chairman
Colville Confederated Tribes
Colville Indian Reservation
Nesepelem, Washington

Resolution 1983-217

COLVILLE BUSINESS COUNCIL

GOVERNING BODY OF THE COLVILLE CONFEDERATED TRIBES
COLVILLE INDIAN RESERVATION NESPELEM, WASHINGTON

REJECTING CONTENTION OF DEPARTMENT OF JUSTICE IN ADSIT CASES 1/ THAT McCARRAN AMENDMENT, 43 U.S.C. 666, AUTHORIZES STATES TO ADMINISTER RESERVED INDIAN WATER RIGHTS

WHEREAS, the Colville Confederated Tribes, recognized by the Secretary of the Interior and duly organized, has from time immemorial exercised its reserved rights to theuse of water and its reserved rights of fishery, within the Colville Indian Reservation, Nespelem, Washington, and has from time immemorial exercised is inherent sovereign power of self-government to administer both its reserved water rights and its reserved rights of fishery, that exercise of inherent power of self-government being essential to the health and welfare of the Colville Confederated Tribes; and

WHEREAS, the Colville Confederated Tribes have on this date adopted Resolution No. 1983-218 condemning the wholly improper conduct of the Department of Justice attempting to represent conflicting interests in water rights litigation, including the reserved rights of the Colville Confederated Tribes, which Resolution No. 1983-218 is incorporated herein and made a part of this Resolution to the same extent and with the same effect as it set forth herein in full; and

WHEREAS, the Colville Indian Reservation was created by an Executive Order dated July 2, 1872, seventeen (17) years antecedent to the admission into the Union of the State of Washington, pursuant to an Enabling Act 2/ which precludes the State of Washington from exercising jurisdiction over the properties of the Colville Confederated Tribes, including, but not limited to, the Tribes' invaluable rights to the use of water and the Tribes' rights of fishery; and

WHEREAS, the Congress of the United States has fully recognized that the title to the Tribal lands and reserved rights to the use of water within the Colville Indian Reservation resides with the Tribes, and the Supreme Court of the United States has upheld the immunity of the Colville Confederated Tribes, their properties, and their membership from the jurisdiction, administration and control of the State of Washington; 3/ and

1/ Brief for the United States, State of Montana v. Northern Cheyenne Tribe (Adsit) in the Supreme Court, No.81-2147; No. 81-2188

2/ Infra., Footnote 10

3/ Seymour v Superintendent, 368 U.S. 351, 356 (1962); Antione, et ux., v. Washington, 420 U.S. 194 (1975)

WHEREAS, the Colville Confederated Tribes have vigorously at all times exercised their inherent power of self-government and have steadfastly fostered the Tribes' economic growth and stability and have consistently rejected the illegal efforts of the State of Washington to intrude upon the Colville Indian Reservation and to denigrate the inherent sovereign power of self-government which resides in the Tribes, which inherent sovereign power is fully exercised in adminstering the water resources and rights of fishery within the Colville Indian Reservation; 4/ and

WHEREAS, the Colville Confederated Tribes initiated the case of Colville Confederated Tribes v. Walton, et al., in the United States District Court for the Eastern District of Washington, Civ. No. 3421 5/ to preserve and protect its reserved rights to the use of water and its rights for fishery against the intentional violation of those rights by Defendants Waltons who were and are asserting rights to the use of water against the Colville Confederated Tribes predicated upon the laws of the State of Washington and otherwise; and

WHEREAS, the State of Washington intervened in the aforesaid case of Colville v. Walton, and there vigorously contested the Tribes' inherent sovereign power to assert against the Defendants Waltons the Tribes' title to its reserved rights to the use of water and the right to administer those rights, all as more fully set forth in Resolution No. 1983-218 which is incorprated into this Resolution by reference; and

WHEREAS, the Court of Appeals for the Ninth Circuit in Colville v. Walton, et al., State of Washington, Intervenor, sustained the Tribes' reserved rights to the use of water 6/ and recognized the Tribes' right to re-establish its fisheries 7/ and with specificity rejected the contentions of the State of Washington, the Defendants Waltons, and the contentions of the Department of Justice, at least obliquely presented, that the State of Washington had jurisdiction ove the Tribes' rights to the use of water, the subject res of the case;8/ and

4/ Infra., Footnote 7.

5/ Colville Confederated Tribes v. Walton et ux, et al.460 F. Supp. 1320, USDC, E.C. WA.h. (1978)

6/ Colville V. Walton, 647 F.2d, 42, 46 (CA 9, 1981); Cert.den. 102 SCt. 657, (1981)

7/ Ibid., at p. 48.

8/ Ibid., at P.46, Footnote 6.

WHEREAS, the Court of Appeals in its decision cited the Enabling Act pursuant to which the State of Washington was admitted into the Union, reaffirming its earlier decision of United States V. McIntire, 9/ and in express terms rejected the jurisdiction of the State of Washington over the Tribes' rights to the use of water there before the Court, and said this:

> In United States v. McIntire.. we held that state water laws are not controlling on an Indian reservation:
>
> > '(T) he Montana statutes regarding water rights are not applicable, because Congress at no time has made such statutes controlling in the reservation. In fact, the Montana enabling act specifically provided that Indian lands within the limits of the state, "shall remain under the absolute jurisdiction and control of the Congress of the United States."'
>
> Identical language appears in the Washington Enabling Act, Ch. 180, 25 Stat. 676, 677 (1889) We adhere to this holding because we find no indication Congress intended the State to have this power. 10/

and

WHEREAS, the issue of forcing state control and administration upon the Colville Confederated Tribes and their reserved rights to the use of water was squarely before the Court of Appeals in the case of Colville v. Walton, State of Washington, Intervenor, having referred specifically to the Enabling Act which made in applicable the state water laws on Indian Reservations, the Court of Appeals said this:

> (1) Public Law 280, Act of August 15, 1953, 67 Stat. 588, did not delegate this regulatory power to the State.
>
> (2) Nor do we perceive the McCarran Amendment, 43 U.S.C. 666, as expanding the state's regulatory powers over water on a Federal reservation. 11/

9/ 101 F.2d 650, 654 (CA 9, 1934)

10/ Colville v. Walton, 647 F.2d 42, 46 (CA9, 1981) Cert Den. 102S.Ct. 657 (1981)

11/ Ibid., at P.63/

WHEREAS, by its explicit ruling, the Court of Appeals rejected, as quoted above, the contention that the McCarran Amendment, 43 U.S.C. 666, authorizes the States to exercise control or administration of Indian rights to the use of water within their reservations; and

WHEREAS, the Court of Appeals for the Ninth Circuit, in its decision in *Northern Cheyenne Tribe* v. *Adsit*,12/ hereafter referred to as *Adsit*, reaffirmed the concepts in the *Colville* v. *Walton* decision respecting the lack of jurisdiction of the State of Montana over Indian rights to the use of water, citing and relying upon, in that connection, the Enabling Act, pursuant to which both Montana and the State of Washington were admitted, simultaneously, into the Union; and

WHEREAS, the Department of Justice, in keeping with its aggressive attacks upon Indian rights to the use of water, filed with the Supreme Court, in August, 1983, the "Memorandum of the United States," there asserting that Department's support of the States' claims that they have power to administer and control Indian reserved water rights within their reservations; and

WHEREAS, the Department of Justice, continuing its attack on Adsit, filed its "Brief for the United States" in the Supreme Court, not only attacking the concepts of *Colville* v. *Walton* and *Adsit*, but also declaring that Indian rights federally adjudicated "can be incorporated in the comprehensive State Court decree, which will be administered by State authorities"; 13/ and

WHEREAS, the Department of Justice amplified its contentions to the Supreme Court in *Adsit* by declaring that federal judgments involving Indian rights should be incorporated into "...the eventual State court decree" and "made subject to administration by the appropriate State authorities." 14/ and

WHEREAS, the Colville Confederated Tribes have been informed of the efforts of the Department of Justice to force upon the Blackfeet Indian Tribe that Department's unwanted and rejected representation, all as has been attempted by the Justice Department in regard to the Colville Tribes in *Colville* v. *Walton*, *State of Washington*, *Intervenor*; and

WHEREAS, the Colville Confederated Tribes have considered the "Motion to Suspend All Proceedings in This Court Respecting the Water Rights of the Blackfeet Indian Tribe, Browning, Montana, and To Preclude the Solicitor General or Any Other Attorney of the Department of Justice from Purporting To Represent That Tribe in These Proceedings and Points and Authorities in Support," submitted by the Blackfeet Tribe to the Supreme Court on March 22, 1983,and fully support the

12/ 668 F.2d, 1080 (CA 9, 1982); Pet. Cert. granted and argued March 22, 1983

13/ Ibid., "Brief for the United States," p.23.

14/ Ibid., at p.10.

the Blackfeet Indian Tribe in its effort to preclude the Department of Justice from forcing upon that Tribe the unwanted representation by the Justice Department and its attempt to force State Jurisdiction and control upon the Blackfeet Tribe's reserved water rights; and

NOW, THEREFORE, BE IT RESOLVED, that the Colville Confederated Tribes reject as totally unethical and unprofessional the efforts of the Attorney General, and members of his staff, who, for purely political expediency, illegally seek to force upon the American Indian Tribes, including the Colville Confederated Tribes and the Blackfeet Indian Tribe, all as reviewed above, their anti-Indian policies which include, but are not limited to, the attempts to force state jurisdiction, administration, and control over the Indian reserved rights to the use of water within Indian Reservations; and

BE IT FURTHER RESOLVED, that the conduct of the Department of Justice in the on-going case of Colville v. Walton, State of Washington, Intervenor, which conduct parallels absolutely the conduct of the Department of Justice as it pertains to the Blackfeet Indian Tribe in the Adsit cases, is positive proof that the Attorney General of the United States, through members of the Department of Justice, is undertaking to terminate the relationship under the Constitution of the United States between the Indian Tribes and the United States Trustee and thereby stipping from the Indian Tribes their Constitutional guarantees that the Indian Tribes will not be annihilated and their properties confiscated by the states, which guarantees to Indian Tribes are explicitly set forth in the Enabling Acts which retain in Congress "the absolute jurisdiction and control" over the Indian lands and their reserved rights to the use of water within their Reservations, including the Colville Indian Reservation in the State of Washington and the Blackfeet Reservation in the State of Montana; and

BE IT FURTHER RESOLVED, that the Senate Select Committee on Indian Affairs, as part of its hearing set for April 12, 1983, undertake forthwith to investigate the illegal and unauthorized efforts of the Department of Justice and the Department of the Interior to force upon the Indian Tribes state jurisdiction, control, and administration over the Indian reserved rights to the use of water and that the Select Committee take all appropriate action to preclude those Departments from forcing upon the Indian tribes the unwanted representation of the Department of Justice in water rights litigation; and

BE IT FURTHER RESOLVED, that the Senate Select Committee on Indian Affairs fully support the Blackfeet Indian Tribe in the Tribe's resistance to further wasteful, and duplicative studies upon the Blackfeet Indian Reservation, the objective of which is vastly to reduce the Blackfeet Tribe's reserved water rights for the benefit of adverse claimants, likewise represented by the Department of Justice. all as reviewed in the Blackfeet Tribe's

"Motion" to the Supreme Court in the Adsit cases.

COLVILLE BUSINESS COUNCIL

BY: ____________________
Chairperson

CERTIFICATION

The foregoing Resolution was adopted at a Special Session on April 5, 1983, at which a quorum was present, and the Resolution was adopted by a vote of 8 FOR 0 AGAINST, the Chairman or the Vice-Chairman in his absence, being authorized to sign the Resolution.

BY: Mel Tonasket
Secretary, Colville Business Counci

Resolution 1983-219

COLVILLE BUSINESS COUNCIL

GOVERNING BODY OF THE COLVILLE CONFEDERATED TRIBES
COLVILLE INDIAN RESERVATION NESPELEM, WASHINGTON

COLVILLE CONFEDERATED TRIBES CONDEMNS AS UNETHICAL, ILLEGAL AND GROSSLY UNPROFESSIONAL FOR THE DEPARTMENT OF JUSTICE TO PURPORT TO REPRESENT INDIANS IN WATER RIGHTS LITIGATION WHILE SIMULTANEOUSLY REPRESENTING ADVERTSE CLAIMANTS TO TRIBAL WATER RIGHTS

WHEREAS, the Colville Confederated Tribes, recognized by the Secretary of the Interior and duly organized, has from time immemorial exercised its reserved rights to the use of water and its reserved rights of fishery, within the Colville Indian Reservation, Nespelem, Washington, and has from time immemorial exercised its inherent sovereign power of self-government to administer both its reserved water rights and its reserved rights of fishery, that exercise of inherent power of self-government being essential to the health and welfare of the Colville Confederated Tribes; and

WHEREAS, there is incorporated into this Resolution a companion Resolution adopted this date by the Colville Confederated Tribes and made a part of this Resolution, which the Colville Confederated Tribes reject the efforts of the Department of Justice and the Department of the Interior to force upon the Colville Confederated Tribes and other Indian Tribes state jurisdiction, control, and administration of Indian reserved water rights, all as is being attempted by the Department of Justice in its "Brief for the United States," purportedly on behalf of the Blackfeet Indian Tribe and other Tribes, in the case now before the Supreme Court, State of Montana v. Northern Cheyenne Tribe (Adsit cases) Nos. 81-2147 and 81-2188, which cases were orally argued on March 23, 1983; and

WHEREAS, in the companion Resolution, the Colville Confederated Tribes have expressed full support of the assertions of the Blackfeet Indian Tribe, all as set forth in that Tribe's "Motion to Suspend All Proceedings in This Court Respecting the Water Rights of the Blackfeet Indian Tribe, Borwning, Montana, and To Preclude the Solicitor General or Any Other Attorney of the Department of Justice From Purporting To Represent That Tribe in These Proceedings and Points and Authorities in Support," submitted to the Supreme Court on March 22, 1983; and

WHEREAS, in connection with the April 12, 1983 Oversight Hearing of the Senate Select Committee on Indian Affairs, which involves the efforts of the Department of Justice and the Bureau of Indian Affairs, at great cost to the United States, to undertake new and duplicative soil and land classification studies in connection with the Blackfeet Indian Reservation, the results of which will be greatly to reduce the reserved rights of the Blackfeet Indian Tribe, all as fully set forth in the Blackfeet "Motion" to the Supreme Court, reference to which is made immedately above; and

WHEREAS, the Colville Confederated Tribes have had experiences similar to that now being forced upon the Blackfeet Indian Tribe by the Department of Justice in its effort aggressively to violate Indian water rights for the benefit of non-Indian claimants; and

WHEREAS, when the State of Washington intervened in the case of *Colville* v. *Walton*, the Colville Confederated Tribes requested the Department of Justice to intervene in the case on its behalf, which Department, rather than assisting the Tribes, vigorouly attacked the Tribe, upholding the position of Defendants Waltons in their claim to water rights, the circumstances of which are summarized by the Court of Appeals as follows:

> The Tribe asked the United States (Justice Department) to intervene on its behalf. Instead, the Justice Department filed a separate suit against Walton, based on the theory that the Secretary of the Interior has exclusive jurisdiction over the water on the reservation. The trial court consolidated the proceedings *sua sponte*. (Colville v. Walton; United States v. Walton). The United States filed an appeal from the decision and the Tribe moved 'not to be bound' by any ruling on U.S. v. Walton, No. 79-4619. The United States has since dropped its appeal and we deny the Tribe's motion....1/

as moot, the Department of Justice having capitulated when challenged in its unethical conduct; and

WHEREAS, paralleling the conduct of the Department of Justice respecting the Blackfeet Tribe, that Department, in *Colville* v. *Walton*, State of Washington, Intervenor, undertook aggressively to obtain from the Colville Confederated Tribes their carefully prepared evidence and additionally undertook to obtain evidence used in the trial of the case of *Colville* v. *Walton* to be used by the Justice Department against the Tribes; and

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1/ Colville v. Walton, 647 F.2d42, 46, note 6 (CA9, 1981); Cert. den. 102 S.Ct. 657 (1981).

WHEREAS, further demonstrating the attacks upon Indians reserved rights to the use of water, the Department of Justice in the case of Colville v. Walton, attempted to prevent the Colville Confederated Tribes from calling as their expert witness Charles P. Corke, Chief Engineer Indian Irrigation Projects, Bureau of Indian Affairs, who had been designated by the Commissioner of Indian Affairs, to assist the Colville Confederated Tribes in the trial of the case; and

WHEREAS, in the case of Northern Cheyenne Tribe v. Adsit,2/ in which the Department of Justice purports to represent the Blackfeet Indian Tribe, the Court of Appeals makes this most favorable declaration for Indian Tribes:

> E. Conflicts of Interest
>
> The Tribes argue that conflicts among these interests would prevent the United States from representing them adequately. When the United States is faced with such a conflict, its representation of Indians is inadequate. Manygoats v. Kleppe 558 F.2d 556, 558 (9th Cir. 1972).
>
> *********
>
> Under these circumstances, where the sovereign immunity of the Tribe has not been waived, and there is a conflict of interest between the Tribe and the United States, the Tribe could only protect its rights by intervening, at the expense of its basic right to sovereign immunity. We will not put the Tribe to this Hobson's choice.
>
> *********
>
> Our examination of this conflicts factor leads us to conclude that it would not be wise or appropriate for the federal court to give up its traditional jurisdiction and defer to the state court in this case. 3/

and

WHEREAS, irrespective of the fact that the Adsit decision is not only highly favorable to the Blackfeet Indian Tribe but fully supports the decision in Colville v. Walton, in which the State of Washington was denied jurisdiction over the Colville rights there involved, the Department of Justice, nevertheless, attacked the Adsit decision and has joined the states in seeking to force upon Indian Tribes state jurisdiction, control, and administration over the Tribes rights to the use of water and has undertaken to deny that the Department of Justice is immersed in conflicts of interest

2/ 668 F.2d 1080, 1089 (CA 9, 1982), Cert. granted, orally argued March 23, 1983, before the Supreme Court.

3/ Ibid., at pp. 1080, 1090

of the character that renders it unethical and unprofessional for it to appear in water rights litigation purporting to represent Indian Tribes while simultaneously representing the Secretary of the Interior and others who claim adversely to the Indian Tribes' rights, all as specifically reviewed in detail in the March 22, 1983 "Motion" submitted by the Blackfeet Tribe to the Supreme Court; and

WHEREAS, the conflicts of interest which permeate the conduct of the Department of Justice give rise to the need for the Senate Select Committee on Indian Affairs fully to investigate the contract entered into by the Bureau of Indian Affairs at the "prodding of the Department of Justice," which contract constitutes an outright attack upon the reserved rights of the Blackfeet Indian Tribe, all as reviewed in the aforesaid "Motion"; and

WHEREAS, the Colville Confederated Tribes and all other Indian Tribes are threatened by the conduct of the Department of Justice in the Adsit cases, in the Colville, and other cases, particularly in view of the conflicts of interest that permeate that Agency's conduct, which conduct must be fully exposed and publicly condemned if the Indians are not to be destroyed by the efforts of the Department of Justice to force the Tribes' reserved rights under state jurisdiction and control and further to constrict those Indian rights for the benefit of non-Indian constituents.

NOW THEREFORE, BE IT RESOLVED, by the Colville Confederated Tribes, that the Senate Select Committee on Indian Affairs, at its hearing on April 12, 1983, undertake fully to expose and condemn the policies and practices of the Department of Justice in its attacks upon Indian reserved rights to the use of water and the intentional violation of those reserved water rights for the benefit of the conflicting interests which the Department of Justice unethically represents while purporting simultaneously to represent the Blackfeet Indian Tribe and other Indian Tribes; and

BE IT FURTHER RESOLVED BY THE COLVILLE CONFEDERATED TRIBES, that the Colville Tribes join the Blackfeet Indian Tribe in its effort successfully to interpose its objection to new, wasteful, and additional soil and land classification studies which, as stated in the Blackfeet "Motion" to the Supreme Court, are to be utilized by the Department of Justice to replace already completed studies favorable to the Tribe, which have been accepted by the Tribe and the Bureau of Indian Affairs.

COLVILLE BUSINESS COUNCIL

BY: ____________________
Chairperson

Resolution 1983-218
Page 5

The foregoing resolution was adopted at a SPECIAL Session held on April 5, 1983, at which a quorum was present and the Resolution was adopted by a vote of 8 FOR 0 AGAINST, the Chairman or Vice-Chairman in his absence, being authorized to sign the resolution.

Mel Tonasket for
Secretary, Colville Business Council

RONNIE LUPE
CHAIRMAN

Executive Office of the Chairman
WHITE MOUNTAIN APACHE TRIBE

May 2, 1983

Senator John Melcher
Senate Select Committee
on Indian Affairs
6317 Dirksen Senate Office
Building
Washington, D.C. 20510

Dear Senator Melcher:

I want to thank you for the opportunity to submit written testimony to the Senate Select Committee on Indian Affairs in relation to the Hearing held on April 12, 1983 regarding the disbursement of funds by the BIA to do a study of the irrigable acres on the Blackfeet Reservation.

As you read the enclosed statement, I think you will be struck by the similarities of the situation faced by the White Mountain Apache Tribe to the problems encountered by the Blackfeet Tribe. It seems self evident that there is a concerted effort on the part of the Secretary of the Interior, through the BIA, and the Justice Department to deprive Western Tribes of their water rights.

Again thank you for allowing me to submit this written testimony.

Sincerely,

Ronnie Lupe, Tribal Chairman
WHITE MOUNTAIN APACHE TRIBE

RL/lje

cc: Senator Dennis DeConcini
Senator Barry Goldwater

PHONE (602) 338-4371 • P. O. BOX 1150 • WHITERIVER, ARIZONA 85941

RONNIE LUPE
CHAIRMAN

Executive Office of the Chairman
WHITE MOUNTAIN APACHE TRIBE

April 12, 1983

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

STATEMENT
OF
RONNIE LUPE
CHAIRMAN OF THE WHITE MOUNTAIN APACHE TRIBE
FORT APACHE INDIAN RESERVATION
WHITERIVER, ARIZONA

DESTRUCTION OF WESTERN INDIAN TRIBES BY SECRETARY WATT

INTRODUCTION

Thank you for permitting me to present to you this statement of the White Mountain Apache Tribe, Fort Apache Indian Reservation, Whiteriver, Arizona. I am Chairman of that Tribe. I am fully aware that the prime issue concerning which the Select Committee convened this hearing pertains to the Blackfeet Indian Tribe, Browning, Montana. I know that the Blackfeet Indian Reservation is geographically far removed to the North of the White Mountain Apache Reservation. Nevertheless, there is a striking similarity between the attack by the Bureau of Indian Affairs upon the Blackfeet Indian Tribe, giving rise to this hearing, and the attack which my Tribe is being subjected to in Arizona by Secretary Watt and his personnel in the Bureau of Indian Affairs.

I have been subjected to almost exactly the same treatment by officials of the Bureau of Indian Affairs and the Department of Justice as is being directed against Chairman Earl Old Person. Unquestionably, there is, under the direction of Secretary Watt, a well-organized attempt to destroy Western Indian Tribes and to terminate their relationship with the Federal government.

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In that manner, the Indian lands and reserved rights to the use of water will be made available for Secretary Watt's constituency that avidly desires to acquire Indian lands and water. I call upon this Committee to protect Western Indians from the attacks now being directed against them by Secretary Watt.

ACTIONS IN THE SUPREME COURT SHOULD PRECLUDE THE BUREAU OF INDIAN AFFAIRS FROM CONTRACTING AS IT PROPOSES

I do not have all the information about the conduct of the Bureau of Indian Affairs on the Blackfeet Indian Reservation. On the basis of available information, it is manifest beyond question that on the Blackfeet Reservation, as on the White Mountain Apache Indian Reservation, the Bureau of Indian Affairs vigorously seeks to obtain data by its new study to be used against the Tribe in water rights litigation. The struggle between the Indian Tribes and the Bureau of Indian Affairs is for life or death.

All too often, it is ignored that the Bureau of Indian Affairs officials are working for Secretary Watt who is anti-Indian. Overlooked is the fact that, in selecting personnel, Secretary Watt has the liberty of obtaining those "Indians" that he can utilize against other Indians. That is the Watt policy and that is the Watt practice.

On my Reservation, and under my direction, the Tribe intensively studied its water requirements and its water supply. As stated, there is a striking resemblance between the White Mountain Apache Indian Reservation and the Blackfeet Indian Reservation. The Salt River and many of its tributaries arise on our Reservation. I understand that the waters of the Milk River and other streams arise on the Blackfeet Indian Reservation. On the Salt River, far below our Reservation, the Secretary of Interior operates the Salt River Federal

Reclamation Project. As a consequence, on both the White Mountain Apache Reservation and on the Blackfeet Indian Reservation, Secretary Watt is asserting claims against the Indian Tribes for the benefit of the Federal Reclamation Projects which Secretary Watt operates for non-Indians.

Incredibly, the Department of Justice purports to be a lawyer for both Secretary Watt and for these Indian Tribes from whom Secretary Watt seeks to strip their water rights for the reclamation projects he administers. No honest lawyer would purport to represent two clients with irreconcilable conflicts, yet that is precisely what the Department of Justice is attempting to do in regard to both the Blackfeet and the White Mountain Apache Tribes.

There is another striking parallel. The Department of Justice sought, through the Bureau of Indian Affairs, to obtain information to be used against the White Mountain Apache Tribe in water litigation in which the Department of Justice, as stated, purports to represent both the Secretary of the Interior and my Tribe. Our Tribal Court enjoined the Bureau of Indian Affairs and other Federal personnel from obtaining the data which the Department of Justice would use against us. The Justice Department promptly sued the Tribe. That matter is now pending in the Federal Court in Phoenix. I believe we will win that case because we charge the Department of Justice and the Department of the Interior with bad faith. I assure you that we can prove bad faith on the part of the Justice Department which simultaneously purports to represent the interests of my Tribe and the interests of the Secretary of the Interior, whose interests are diametrically opposed to my Tribe.

I am convinced that the conflicts of interest which we are prepared to prove in the case of United States v. White Mountain Apache Tribe in the United States District Court for the District of Arizona will fully test the propriety of the conduct of the Bureau of Indian Affairs and the Department of Justice in seeking to use tribal information against the Tribe in water litigation, as is being tested in the Blackfeet matter. Those issues will undoubtedly proceed to the Supreme Court. Moreover, those issues fully complement the conflict of interest issues which are in the Adsit cases and in which the Court of Appeals for the Ninth Circuit fully sustained the contentions that it is wholly improper for the Attorney General to force upon the Tribes his representation which is rendered "inadequate" due to conflicts of interest.

It is too clear for serious challenge that Secretary Watt's purpose in having the Bureau of Indian Affairs conduct additional studies on the Blackfeet Indian Reservation is to find ways and means of reducing the Blackfeet rights. Secretary Watt is well aware of the fact that, by reducing the economic stability of the Blackfeet Indian Reservation, he will render it wholly within his power to terminate for all times the Blackfeet Indian Tribe and to seize and take from the Tribe its land and water rights. In that manner, Secretary Watt will have achieved one of his goals - the destruction of Western Indian Tribes.

SECRETARY WATT'S ATTACK UPON BLACKFEET IS IDENTICAL WITH THE ON-GOING WAR BEING WAGED AGAINST THE WHITE MOUNTAIN APACHE TRIBE

I have spoken to you of the parallel between the attack upon the Blackfeet Indian Tribe in Montana and the White Mountain Apache Tribe in Arizona. On both Reservations, the entire effort of the Interior and Justice Departments is directed against the Tribes who have retained reserved rights to the use of water so avidly sought after by the Secretary of the Interior. Every device possible is being utilized to make available to the Secretary of the Interior and the Bureau of Indian Affairs the waters on those Reservations.

I have personal and immediate knowledge of the extent to which Secretary Watt and former like-minded Secretaries will go in the destruction of Indian people. When I was a young man on the White Mountain Apache Reservation, I lived on what is called Cibecue Creek. At that time the Cibecue was beautiful to behold, a good fishing stream, and an excellent area for swimming. As a young boy and man, I greatly enjoyed that stream.

One day, to the suprise of my family and other Indians in the area, the Bureau of Indian Affairs came and told us that it would be good for everybody to destroy the magnificent trees on Cibecue Creek. We were naive enough to believe the Bureau of Indian Affairs. They destroyed those trees and the vegetation along the Creek.

In a startling short period a drastic change in Cibecue Creek transpired. It was no longer a beautiful, recreational Creek. It became subject to wild flooding. Soon Cibecue Creek was deeply incised and its banks became sharp and steep. Much of the year Cibecue Creek was almost dry; at other times a raging torrent. Erosion is now destroying the Cibecue Valley due to the intentional destruction by the Bureau of Indian Affairs of the trees and vegetation in that area.

It must be remembered that the Bureau of Indian Affairs said it would be beneficial to destroy the timber and the growth along Cibecue Creek. What we did not know then, but know now, is that Cibecue Creek was destroyed as a White Mountain Apache stream for the benefit of the Salt River Federal Reclamation Project.

I described the destruction of Cibecue Creek as an example of what the Bureau of Indian Affairs will do to carry out the Secretary's policy to secure

Indian water. Every stream on our Reservation has been subjected to the same mismanagement as Cibecue Creek and our Reservation is literally being eroded away. There are a quarter-of-a-million acres of land that are badly eroded by reason of the destruction of trees and vegetative cover and today we are waging war against that erosion.

The erosion on our Reservation, induced by the Secretary of the Interior, accomplishes two ends for that official which he desires: (1) the destruction of our Reservation and (2) the increase of water run-off from our Reservation for the benefit of the Federal Reclamation Projects.

It is that kind and type of corruption with which the Indian people are confronted today. It is corruption of the kind that destroyed Cibecue Creek before my very eyes. That corruption is intended to destroy the Blackfeet Tribe for the Secretary of the Interior and his constituents.

WHITE MOUNTAIN APACHE TRIBE V. ATTORNEY GENERAL SMITH AND SECRETARY WATT, NO. 81-2334 IN THE SUPREME COURT

In May of 1981, the White Mountain Apache Tribe brought an action against the Attorney General and Secretary Watt. There the power of the Attorney General to force upon the White Mountain Apache Tribe his unwanted and rejected authority was to be tested. The Department of Justice defended the Attorney General and the Secretary on the grounds that the Attorney General enjoys absolute immunity from suit. The Department of Justice further asserted that the Attorney General as the Chief Law Officer of the United States is above the law, even when charged by the Tribe with arbitrary, capricious, illegal, and bad faith conduct.

In White Mountain Apache Tribe v. Attorney General Smith, the Tribe's Petition for Certiorari is pending before the Supreme Court. I have carefully read the Motion of the Blackfeet Indian Tribe in the Adsit cases. In both cases, the Tribes have great need to be heard by the Supreme Court.

I submit to this Committee that American Indian Tribes must have their day in court against the Department of Justice and the Department of the Interior. Absent assuring the Tribes of their day in court, it is impossible to protect the Tribes under the circumstances that gave rise to this hearing.

As can be seen, the Bureau of Indian Affairs at the direction of the Department of Justice is seeking to obtain information that will be utilized greatly to reduce the water rights of the Blackfeet Tribe. Exactly those tactics are being used against the White Mountain Apache Tribe.

I cannot urge too strongly that this Committee fully investigate the charges against the Bureau of Indian Affairs and the Department of Justice that have been made by the Blackfeet Indian Tribe. I am convinced that this Committee will find that the Bureau of Indian Affairs is aggressively attacking the Blackfeet Tribe and its water rights to assist the Secretary of the Interior to take from that Tribe their invaluable rights for the benefit of non-Indian projects and purposes.

CONCLUSION

I thank the Committee for permitting me to submit to it this statement. I believe that every Western Indian Tribe is threatened by the conduct of Secretary Watt, acting through the Bureau of Indian Affairs - with the cooperation of the Department of Justice - in seeking to terminate the Western Tribes.

Ronnie Lupe
Chairman of the
White Mountain Apache Tribe
Whiteriver, Arizona

Senator **Melcher**. The hearing is adjourned.

[Whereupon, at 12:28 p.m., the hearing was adjourned.]

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